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In the Supreme Court of the United States

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL., PETITIONERS

v.

SENECA-CAYUGA TRIBE OF OKLAHOMA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Johnson Act, 15 U.S.C. 1171 *et seq.*, prohibits, among other things, the possession or use of "any gambling device" within Indian country. The Johnson Act defines a gambling device to include "any * * * machine or mechanical device" that is "designed and manufactured primarily for use in connection with gambling, and * * * by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property." 15 U.S.C. 1171(a)(2). The Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*, expressly exempts Indian Tribes from the prohibitions of the Johnson Act when a Tribe and a State have entered into a gaming compact approved by the Secretary of the Interior. 25 U.S.C. 2710(d)(6). In the absence of such a compact, the Indian Gaming Regulatory Act provides that tribal gaming is permissible only to the extent that it is "not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. 2710(b)(1)(A). The questions presented are:

1. Whether the Indian Gaming Regulatory Act creates an implied exemption from the Johnson Act for certain gambling devices used at tribal gaming facilities in Indian country in the absence of a tribal-state gaming compact; and, if not,

2. Whether a machine can qualify as a gambling device under the Johnson Act when a player becomes entitled to receive money as a result of the sequence of winning and losing pull-tabs on a pre-printed paper roll inserted into the machine.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States and the other federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 327 F.3d 1019. The judgment of the district court (App., *infra*, 46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2003. A petition for rehearing was denied on June 24, 2003 (App., *infra*, 47a-48a). On September 15, 2003, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including October 22, 2003, and, on October 10, 2003, Justice Breyer extended that time to and including November 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Titles 15 and 25 of the United States Code are reproduced at App., *infra*, 49a-54a.

STATEMENT

This is one of two cases recently decided by the courts of appeals that address the relationship between the Johnson Act, 15 U.S.C. 1171 *et seq.*, which prohibits the use of "any gambling device" in Indian country, and the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, which authorizes the use of gambling devices in Indian country under certain circumstances. IGRA provides an *express* exemption from the Johnson Act for tribal gaming conducted pursuant to a compact entered into between a State and a Tribe and approved by the Secretary of the Interior. 25 U.S.C. 2710(d)(6). The Tenth Circuit held in this case that IGRA also provides an *implied* exemption from the Johnson Act for certain gambling devices used at tribal casinos even in the absence of such a compact. The Eighth Circuit recently reached the opposite conclusion in *United States* v. *Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (2003), a case that involves a device that is virtually identical to the one involved in this case. The United States is filing a certiorari petition in that case as well, presenting a question, also raised in this case, concerning the scope of the Johnson Act.

1. a. The Johnson Act prohibits, among other things, the manufacture, sale, transportation, possession, or use of "any gambling device" within the District of Columbia, federal enclaves and possessions, and, as relevant here, "Indian country." 15 U.S.C. 1175(a). The Johnson Act also prohibits the transportation of gambling devices in interstate commerce to or from any place in which their operation is unlawful. 15 U.S.C. 1172(a). The Johnson Act defines a "gambling device" to include not only a slot machine, see 15 U.S.C. 1171(a)(1), but also any other machine or mechanical device that is:

> designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

15 U.S.C. 1171(a)(2).

b. In 1987, this Court held in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, that a State cannot prohibit bingo and card games on Indian reservations if the State allows such games elsewhere. In the wake of that decision, Congress enacted IGRA in 1988 "to provide a statutory basis for the operation and regulation of gaming by Indian tribes." *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 48 (1996) (citing 25 U.S.C. 2702). The purposes of IGRA include enabling Tribes to conduct gaming to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. 2702(1), and providing a regulatory structure adequate to "shield [tribal gaming] from organized crime and other corrupting influences * * * and to assure that gaming is conducted fairly and honestly by both the operator and players," 25 U.S.C. 2702(2).

IGRA establishes three classes of Indian gaming, each of which is subject to a distinct regulatory regime. *Class I* gaming, which is not at issue in this case, consists of social games played solely for prizes of minimal value and traditional forms of Indian gaming. Tribes have exclusive jurisdiction to regulate such games. See 25 U.S.C. 2703(6), 2710(a)(1).

Class II consists, as relevant here, of "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) * * * including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other

games similar to bingo." 25 U.S.C. 2703(7)(A)(i). Class II excludes "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. 2703(7)(B)(ii). Class II gaming is permissible "within a State that permits such gaming for any purpose by any person, organization or entity," provided that "such gaming is not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. 2710(b)(1)(A). Class II gaming is subject to regulation by the National Indian Gaming Commission (NIGC), see 25 U.S.C. 2706(b), as well as by Tribes themselves.

Class III is defined as "all forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. 2703(8). Such gaming is permissible only if it occurs in a State that permits it, is conducted in conformance with a tribal-state compact approved by the Secretary of the Interior, and is authorized by a tribal ordinance approved by the Chairman of the NIGC. 25 U.S.C. 2710(d).

IGRA contains an express exception from the Johnson Act for gambling devices used in Class III gaming. IGRA states that "[t]he provisions of section 1175 of title 15 [the Johnson Act] shall not apply to any gaming conducted under a Tribal-State compact that—(A) is entered into under [25 U.S.C. 2710(d)(3)] by a State in which gambling devices are legal, and (B) is in effect." 25 U.S.C. 2710(d)(6). IGRA contains no comparable exemption for gambling devices used in Class II gaming.

2. Respondents are Diamond Game Enterprises, Inc., the manufacturer of the Magical Irish Instant Bingo Dispenser System (Magical Irish), and three Indian Tribes, the Seneca-Cayuga Tribe of Oklahoma, the Fort Sill Apache Tribe of Oklahoma, and the Northern Arapaho Tribe of Wyoming. The Tribes, having not entered into gaming compacts with their respective States, cannot engage in Class III gaming under IGRA. The Tribes have been authorized by the NIGC to operate Class II gaming facilities, and the Tribes have

used, or sought to use, Magical Irish machines at those facilities. See App., *infra*, 9a.

a. From the player's perspective, Magical Irish resembles, in both appearance and play, a slot machine or other casino gambling device. Magical Irish, like other such machines, is housed in an illuminated cabinet. The player deposits money into the Magical Irish machine, presses a button to activate the machine, and views a video display that indicates whether or not he has won. The Magical Irish game "can be a high-stakes, high-speed affair," as a player can complete a game "every seven seconds." See App., *infra*, 8a-9a; see *Santee Sioux Tribe*, 324 F.3d at 610 (noting that the similar Lucky Tab II machines in that case "look and sound very much like traditional slot machines").

Magical Irish differs in its design to some extent from more common gambling devices. Whether a player of Magical Irish wins or loses is determined by the sequence of bar codes on a pre-printed paper roll of pull-tabs that is inserted into the machine. (Similar paper rolls have been used to supply pull-tabs to be purchased by persons playing the traditional game of paper pull-tabs without a machine.) When the player presses a button, the machine reads the next pull tab on the roll, which triggers the video display, and dispenses the pull-tab to the player. The video screen depicts a grid that is similar in appearance to that of a video slot machine. If the screen indicates that the pull-tab is a winner, the player may obtain money for the winning pull-tab only by presenting it to a cashier at the casino. In addition to relying on the video screen, the player is free to open the pull-tab manually to see whether it is a winner. See App., *infra*, 8a-9a.

b. In January 2000, respondents asked the NIGC whether Magical Irish qualifies under IGRA as a Class II "electronic, computer, or other technologic aid[]" to playing the game of pull-tabs, as distinguished from a Class III game. In response, the NIGC issued an advisory opinion finding

Magical Irish to be a Class III game. The NIGC's opinion relied on a district court decision, subsequently reversed on appeal, which held that a similar device, called Lucky Tab II, was a Class III game under IGRA. See App., *infra*, 9a-10a; *Diamond Game Enters., Inc.* v. *Reno*, 9 F. Supp. 2d 13 (D.D.C. 1998), rev'd, 230 F.3d 365 (D.C. Cir. 2000). Neither the NIGC's advisory opinion nor the decisions in *Diamond Game* determined whether Lucky Tab II was a gambling device within the meaning of the Johnson Act.

c. After the NIGC issued its advisory opinion, respondents commenced this suit in the United States District Court for the Northern District of Oklahoma against the Attorney General, the Department of Justice, the United States Attorney, and the NIGC. Respondents sought a declaratory judgment that (1) Magical Irish is not a "gambling device" under the Johnson Act, and (2) Magical Irish is a Class II "aid" under IGRA. Respondents also sought to enjoin the federal authorities from taking enforcement action against them with respect to Magical Irish. See App., *infra*, 10a.

d. The district court, after conducting an evidentiary hearing, held that Magical Irish "is not a gam[bl]ing device under the Johnson Act" and "is a permissible Class II aid under [IGRA]." App., *infra*, 11a-13a, 46a.

In an oral ruling addressing the Johnson Act question, the district court stated that, "[w]hile the game of pull-tabs itself, by its nature, contains an element of chance, no additional element of chance is applied by the [Magical Irish device]." The court reasoned that the device "cannot change the outcome of the game," but only "dispenses preprinted prearranged pull-tabs" and "make[s] the play of the game more enjoyable." The court added that "a participant cannot win anything without first taking [the paper pull-tab] to a cashier." App., *infra*, 12a; Gov't C.A. Br. 8.

The district court relied on similar reasoning in concluding that Magical Irish is "*a technologic aid to dispensing Pull-*

Tabs" under IGRA. The court stated that Magical Irish "doesn't determine who the winner is"; rather, the winner "is predetermined when the Pull-Tabs are printed at some other location before the game is ever played." App., *infra*, 11a-12a; Gov't C.A. Br. 7-8.

3. The court of appeals affirmed. App., *infra*, 1a-45a.

The court of appeals held that IGRA provides an implied exemption from the Johnson Act for gambling devices used by Tribes as "electronic, computer, or other technologic aids" to Class II games such as bingo, lotto, and pull-tabs. App., *infra*, 19a-29a; see 25 U.S.C. 2703(7)(A)(i). The court perceived that Congress had not spoken in IGRA to "the relationship between the Johnson Act and IGRA Class II technological aids." App., *infra*, 20a. Proceeding on that premise, the court then refused, "[a]bsent clear evidence to the contrary," to "ascribe to Congress the intent both to carefully craft through IGRA th[e] protection afforded to users of Class II technologic aids and to simultaneously eviscerate those protections by exposing users of Class II technologic aids to Johnson Act liability." *Id.* at 22a. Although the court acknowledged that IGRA expressly exempts gambling devices from the Johnson Act when they are used in Class III gaming pursuant to an approved tribal-state compact, see 25 U.S.C. 2710(d)(6), the court declined to draw the inference that IGRA was not intended to exempt gambling devices from the Johnson Act in other circumstances. App., *infra*, 26a-27a.

The court of appeals read the Senate Select Committee on Indian Affairs' Report on IGRA as supporting the view that Class II technologic aids are exempt from the Johnson Act. The court noted that the Committee had expressed its intent that "no other Federal statute"—which the court understood to include the Johnson Act—would "preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands." App., *infra*, 23a (quoting S. Rep. No. 446, 100th

Cong., 2d Sess. 12 (1988)). The court viewed that statement as "direct evidence that Congress did not intend the Johnson Act to apply to the use of Class II technologic aids in Indian country." *Ibid.*

The court of appeals then held that Magical Irish is a permissible "technologic aid" to Class II gaming under IGRA. App., *infra*, 29a-44a. The court concluded that IGRA permits technologic aids not only to bingo, but also to other Class II games, including pull-tabs. *Id.* at 29a-37a. In analyzing whether Magical Irish qualifies as a technologic aid, the court deferred to the NIGC's definition of an "aid," which considers whether the device at issue "[a]ssists a player or the playing of a game," "[i]s not an electronic or electromechanical facsimile," and "[is] operated in accordance with applicable Federal communications law." *Id.* at 37a-44a; 25 C.F.R. 502.7. The court concluded that Magical Irish qualifies as a technologic aid because it "facilitates the playing of pull-tabs," and "is not a 'computerized version' of pull tabs." App., *infra*, 44a.

Having held that the Johnson Act does not apply to any gambling device that satisfies IGRA's definition of a Class II technologic aid, the court of appeals did not address whether Magical Irish also satisfies the Johnson Act's definition of a gambling device. See App., *infra*, 28a ("If a piece of equipment is an IGRA Class II technologic aid, a court need not assess whether, independently of IGRA, that piece of equipment is a 'gambling device' proscribed by the Johnson Act.").

REASONS FOR GRANTING THE PETITION

The court of appeals has eviscerated the Johnson Act as a tool for policing casino-style gaming in Indian country. The court of appeals held that the Indian Gaming Regulatory Act (IGRA)—which provides an express exemption from the Johnson Act for gambling devices used in Class III gaming pursuant to approved tribal-state compacts—also provides an implied exemption for gambling devices even in the ab-

sence of such compacts when they are used as purported "technologic aids" to Class II gaming. The court of appeals' holding cannot be squared with IGRA's text, history, and purposes. IGRA explicitly confines Class II gaming to "gaming [that] is not otherwise specifically prohibited on Indian lands by Federal law," 25 U.S.C. 2710(b)(1)(A), and the Johnson Act is just such a specific prohibition against the possession or use of gambling devices in Indian country. The legislative history confirms that IGRA was designed to leave the Johnson Act in full force in Indian country except when gambling devices are used in accordance with a valid tribal-state compact. The continued application of the Johnson Act is essential to fulfilling Congress's purpose in enacting IGRA to ensure the existence of a regulatory regime for lucrative casino-style gaming that is sufficient to protect against corruption. The Tenth Circuit's decision conflicts on this question with the recent decision of the Eighth Circuit in *United States* v. *Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (2003).

Both this case and *Santee Sioux Tribe* raise the additional question whether machines such as Magical Irish, although "designed and manufactured primarily for use in connection with gambling," 15 U.S.C. 1171(a)(2), are nonetheless outside the Johnson Act's definition of a gambling device. The Eighth Circuit in *Santee Sioux Tribe*, like the district court in this case, held that such machines do not fall within that definition, because whether a player wins or loses is determined not by a computer or other permanent component of the machine, but instead by the sequence of pull-tabs on a paper roll that is inserted into the machine. That conclusion is without support in the text or history of the Johnson Act, is contrary to its purpose, conflicts with a decision of the Ninth Circuit, and opens a broad loophole in the Johnson Act both inside and outside Indian country.

A. IGRA Does Not Provide An Implied Exemption From The Johnson Act For Gambling Devices Used Without A Tribal-State Compact As Purported "Technologic Aids" To Class II Gaming

The court of appeals perceived that Congress was "silen[t] * * * regarding the relationship between the Johnson Act and IGRA Class II technologic aids." App., *infra*, 20a. The court of appeals was entirely mistaken. IGRA makes clear that Congress was creating one, and *only* one, exemption from the Johnson Act for tribal gaming: the exemption for gambling devices used in accordance with a tribal-state gaming compact approved by the Secretary of the Interior. In the absence of such a compact, as Congress made clear in 25 U.S.C. 2710(b)(1)(A), tribal gaming operations must conform to the Johnson Act.

1. The Text And History Of IGRA Make Clear That Congress Intended That The Johnson Act Would Bar Any Use Of Gambling Devices In Class II Gaming

a. IGRA states that a Tribe may engage in Class II gaming only if, *inter alia*, "such gaming is not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. 2710(b)(1)(A). The Johnson Act specifically prohibits "within Indian country" the possession or use of "any gambling device." 15 U.S.C. 1175(a). Accordingly, as the Eighth Circuit recognized, "Section 2710(b)(1)(A) clearly states that class II devices may be regulated by another federal statute —obviously the Johnson Act." *Santee Sioux Tribe*, 324 F.3d at 611.

The Senate Select Committee on Indian Affairs Report on IGRA confirms that the Johnson Act is the "specific[] prohibit[ion]" mentioned in Section 2710(b)(1)(A). In discussing Section 2710(b)(1)(A), the Report explains:

> *The phrase "not otherwise prohibited by Federal Law" refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175 [the Johnson Act].* That section

> prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto. It is the Committee's intent that with the passage of this act, no other Federal statute, such as those listed below, will preclude the use of *otherwise legal* devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands. The Committee specifically notes the following sections in connection with this paragraph: 18 U.S.C. section 13, 371, 1084, 1303-1307, 1952-1955 and 1961-1968; 39 U.S.C. 3005; and *except as noted above*, 15 U.S.C. 1171-1178.

S. Rep. No. 446, 100th Cong., 2d Sess. 12 (1988) (emphases added). Plainly, then, the Committee intended that IGRA would *not* permit Tribes to use gambling devices prohibited under the Johnson Act as technologic aids to Class II gaming.[1]

The court of appeals' contrary holding rests principally on its reading of a single sentence from the Senate Committee Report quoted above, which expresses the Committee's intent that "no other Federal statute * * * will preclude the use of otherwise legal devices" as Class II aids. See App., *infra*, 23a (quoting S. Rep. No. 446, *supra*, at 12); see also *id.* at 27a. The court believed that this sentence constitutes "direct evidence" that Congress did not intend the Johnson Act to apply to the use of Class II technologic aids. *Id.* at 23a. That is simply incorrect.

In the first place, the textual savings clause of 25 U.S.C. 2710(b)(1)(A) makes clear that the Johnson Act's prohibitions *do* apply in the absence of a tribal-state compact, and so makes resort to the legislative history unnecessary. In any event, the opening sentence of the quoted paragraph of the Senate Report confirms that Congress intended the statutory reference in 25 U.S.C. 2710(b)(1)(A) to gaming other-

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[1] There was no Conference Report or House Committee Report on IGRA.

wise prohibited by Federal law to refer to "gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175," the Johnson Act. S. Rep. No. 446, *supra*. at 12. Class II gaming that utilizes a Johnson Act gambling device, whether as a purported technologic aid or in some other manner, falls squarely within that expression of congressional intent. The sentence in the Senate Report on which the court of appeals relied expresses the Committee's intent that no other federal statute "will preclude the use of *otherwise legal devices* used solely in aid of or in conjunction with bingo or lotto or other such gaming." *Ibid.* (emphasis added). The requirement that the devices be "otherwise legal" clearly means that the devices must not be among those that the Johnson Act prohibits to be used in Indian country.[2]

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[2] The intervening sentence in the quoted paragraph of the Senate Committee Report states that Section 1175 "prohibits gambling devices on Indian lands," and then expresses the view that the Johnson Act does not apply to unspecified "devices used in connection with bingo and lotto." Although the Report does not elaborate on the point, the Committee presumably had in mind "bingo blowers"—mechanisms that are separate from the player's station and are used to select the numbers to be announced so that bingo players can, in turn, mark their cards. *Cabazon Band of Mission Indians* v. *NIGC*, 827 F. Supp. 26, 31 (D.D.C. 1993), aff'd on other grounds, 14 F.3d 633 (D.C. Cir.), cert. denied, 512 U.S. 1221 (1994); see 25 U.S.C. 2703(7)(A)(i)(II) (specifying as one of the required elements of the Class II game "commonly known as bingo" that "the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or *electronically determined*") (emphasis added). There is no suggestion that the Committee believed that wholly different machines such as Magical Irish were permitted by the Johnson Act, and any such view by a committee of Congress in 1988 about the meaning of the Johnson Act, which was enacted in 1951 and amended in 1962 to expand the definition of "gambling device," would not be entitled to weight here. In any event, the sentence of the Senate Report stating the Committee's understanding of what might be *permitted* by the Johnson Act, whatever that precise understanding might have been, in no way suggests an intent that a device (such as Magical Irish) that is *prohibited* by the Johnson Act on Indian lands could nonetheless be used as a technologic aid to Class II gaming. To the

Such an understanding leaves a wide variety of devices—albeit not Johnson Act gambling devices—within the category of permissible technologic aids to Class II gaming. The Senate Report, for instance, offers examples of the use of permissible Class II aids:

> [T]he Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law.

S. Rep. No. 446, *supra*, at 9. The sorts of aids discussed in that provision would not constitute Johnson Act gambling devices.

b. IGRA's text and legislative history confirm in other respects that Congress intended the Johnson Act to prohibit the use of any gambling devices in Class II gaming.

IGRA contains an express exemption from the Johnson Act for gambling devices used in Class III gaming "conducted under a Tribal-State compact." 25 U.S.C. 2710(d)(6). Even in the absence of Section 2710(b)(1)(A), discussed above, Section 2710(d)(6) would provide a strong indication that Congress did not intend for courts to read additional Johnson Act exemptions into IGRA, such as an exemption for purported "technologic aids" to Class II gaming. See,

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contrary, as explained in the text, the Report makes clear that any such aid must be "otherwise legal" under the Johnson Act.

e.g., *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

If any uncertainty were to remain about whether Congress intended in IGRA to exempt Class II technologic aids from the prohibitions of the Johnson Act, it would be resolved by the Senate colloquy between Senator Inouye of Hawaii, the chairman of the Senate Select Committee on Indian Affairs and the floor manager of IGRA, and Senator Reid of Nevada. Senator Reid asked Senator Inouye whether IGRA's express exemption of compacted Class III gaming from the Johnson Act "is the only respect in which [IGRA] would modify the scope and effect of the Johnson Act." 134 Cong. Rec. 24,024 (1988). Senator Inouye confirmed that IGRA "would not alter the effect of the Johnson Act except to provide for a waiver of its application in the case of gambling devices operated pursuant to a compact." *Ibid.* He added that IGRA "is not intended to amend or otherwise alter the Johnson Act in any way." *Ibid.* Senator Inouye's unequivocal and uncontroverted assurances that the Johnson Act would continue to apply to tribal gaming conducted without a compact, necessarily including Class II gaming, confirm that Congress did not intend to exempt Class II technologic aids from the Johnson Act. See *Begier* v. *Internal Revenue Serv.*, 496 U.S. 53, 64 n.5 (1990) (noting that statements of floor managers can constitute "persuasive evidence of congressional intent").[3]

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[3] As the court of appeals noted, a 1996 memorandum prepared by the Department of Justice's Office of Legal Counsel concluded that IGRA permits the use of some Johnson Act gambling devices as Class II technologic aids. App., *infra*, 26a n.22. That is not, however, the position of the United States. See *ibid.* (noting that the government has "disavowed" that position).

2. Construing IGRA, Consistent With Its Text And History, As Not Exempting Class II Aids From The Johnson Act Comports With IGRA's Twin Purposes Of Promoting Tribal Economic Development And Protecting Against Corruption

The understanding that IGRA preserves the Johnson Act's prohibition against gambling devices in Indian country, except under an approved tribal-state gaming compact, advances Congress's purposes in enacting IGRA. Although Congress sought in IGRA to promote tribal economic development by authorizing gaming on Indian lands, Congress also sought to protect the integrity of such gaming. Both goals are advanced and accommodated by permitting Tribes to engage in lucrative casino-style gaming—gaming that uses gambling devices as defined in the Johnson Act—but only when the safeguards of a tribal-state compact approved by the Secretary of the Interior are in place.

Congress identified multiple purposes to be served by IGRA. One purpose, as the court of appeals noted (App., *infra*, 24a), is to provide "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). An equally important purpose, however, is

> to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players.

25 U.S.C. 2702(2); see 25 U.S.C. 2702(3) (stating that a third purpose of IGRA is to establish the NIGC "to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue").

A principal means that Congress chose to protect tribal gaming against corruption was to give States a role, through the compacting process, in regulating what is potentially the most profitable, and thus most problematic, form of tribal gaming, *i.e.*, casino-type gaming. The Senate Committee Report explained that "existing State regulatory systems" provided the best mechanism for regulating such gaming, because "there is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place." S. Rep. No. 446, *supra*, at 13. The compacting requirement was a central component of IGRA. Indeed, Representative Udall of Arizona, the House floor manager, stated that "the core of the compromise" that produced IGRA was the requirement that "class III gaming activities, generally defined to be casino gaming and parimutuel betting, will hereafter be legal on Indian reservations only if conducted under a compact between the tribe and the State." 134 Cong. Rec. 25376 (1988).[4]

The compacting requirement would be significantly undermined by reading an exemption into IGRA for Johnson Act gambling devices that are used as purported technologic aids to Class II games. A Tribe could then engage in what is, in practical effect, Class III casino gaming without a tribal-state compact, and thus without the state regulatory involvement that Congress considered vital to protecting the integrity of such gaming. It follows that construing IGRA, consistent with its text and history, as exempting gambling devices from the Johnson Act only when they are used in accordance with a tribal-state compact, thus substantially advances Congress's purpose of "shield[ing] [tribal gaming]

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[4] Some members of Congress announced that they, like many Tribes, opposed IGRA precisely because it would allow States a regulatory role with regard to Class III gaming. See, *e.g.*, 134 Cong. Rec. 24,029 (Sen. Burdick); *id.* at 24,030 (Sen. Daschle); *id.* at 25,379-25,380 (Rep. Sikorski); *Id.* at 25,380 (Rep. Frenzel).

from organized crime and other corrupting influences" and "ensur[ing] that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. 2702(2).

This construction of IGRA also is consistent with the framework of the Johnson Act itself. The Johnson Act, in addition to its absolute prohibition on the use or possession of gambling devices in Indian country and other places subject to federal jurisdiction, see 15 U.S.C. 1175(a), also prohibits the shipment of gambling devices into any State unless the State has enacted a law exempting itself from that provision, see 15 U.S.C. 1172(a). The Johnson Act thus defers to a State's own laws with respect to the legality of gambling devices in that State. Similarly, under IGRA, a tribal-state compact may authorize Class III gaming using Johnson Act devices only if such gaming is permitted by state law. 25 U.S.C. 2710(d)(1)(B). The construction of IGRA adopted by the Eighth Circuit in *Santee Sioux Tribe*, in marked contrast to that adopted by the Tenth Circuit in this case, therefore preserves the role for state law and regulatory authority that Congress envisioned when it enacted both IGRA and the Johnson Act.

The court of appeals reasoned that interpreting IGRA to exempt Class II technologic aids from the Johnson Act would advance Congress's purpose of promoting tribal economic development through gaming. App., *infra*, 24a. The court of appeals, however, ignored that IGRA has multiple purposes, including to provide a regulatory scheme sufficient to protect tribal gaming and gaming revenue against corruption. As this Court has recognized, moreover, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *PBGC* v. *LTV Corp.*, 496 U.S. 633, 647 (1990) (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987)).

3. The Three Circuits That Contain Most Of The Nation's Indian Country Are In Conflict As To Whether IGRA Exempts Class II Technologic Aids From The Johnson Act

As noted above, the Eighth Circuit recently held that IGRA does not provide an implied exemption from the Johnson Act for gambling devices used as purported technologic aids to Class II gaming. *Santee Sioux Tribe*, 324 F.3d at 611-612. The Eighth Circuit concluded that 25 U.S.C. 2510(b)(1)(A) "clearly" and "obviously" provides that Class II aids are subject to the Johnson Act. 324 F.3d at 611. The Eighth Circuit further concluded that "IGRA and the Johnson Act can be read together, are not irreconcilable, and [a] Tribe must not violate either act" when it engages in gaming without a tribal-state compact. *Id.* at 612. The D.C. Circuit has similarly recognized (although not as part of a legal holding) that, aside from IGRA's express exemption of compacted Class III gaming from the Johnson Act, "[t]here is no other repeal of the Johnson Act, either expressed or by implication, in [IGRA]," so that "the Johnson Act remain[s] 'fully operative' with respect to class II gaming on Indian lands." *Cabazon Band of Mission Indians* v. *NIGC*, 14 F.3d 633, 635 n.2 (D.C. Cir.), cert. denied, 512 U.S. 1221 (1994); but see *Diamond Game Enters., Inc.* v. *Reno*, 230 F.3d 365, 367 (D.C. Cir. 2000) (stating in dicta that the Johnson Act applies after IGRA to "devices that are neither Class II games approved by the [NIGC] nor Class III games covered by tribal-state compacts").

In contrast, the Ninth Circuit has held, consistent with the Tenth Circuit here, that IGRA exempts technologic aids to bingo from the Johnson Act. *United States* v. *103 Electronic Gambling Devices*, 223 F.3d 1091, 1101-1102 (2000). The Ninth Circuit's rationale would appear to extend to technologic aids to other Class II games, such as pull-tabs, although the Ninth Circuit has not yet had occasion to consider that question.

The Tenth Circuit's decision in this case and the Ninth Circuit's decision in *103 Electronic Gambling Devices* cannot be reconciled with *Santee Sioux Tribe* on this question. In the Eighth Circuit, in order for a device to be used in tribal gaming in the absence of an approved tribal-state compact, the device not only must satisfy IGRA's definition of an "electronic, computer, or other technologic aid[ ]" to Class II gaming, but also must *not* fall within the Johnson Act's definition of a "gambling device." In the Tenth Circuit and (presumably) the Ninth Circuit, however, such a device may be used in tribal gaming, even if it is a gambling device within the meaning of the Johnson Act. Because the vast majority of the Nation's Indian country lies within the Eighth, Ninth, and Tenth Circuits, there is particular reason for the Court to resolve the conflict in this case without awaiting still further cases from other circuits. See *United States* v. *Lara*, No. 03-107 (petition for cert. granted Sept. 30, 2003) (granting review on a question of Indian law on which the Eighth and Ninth Circuits are in conflict).

4. The Question Whether Tribes May Use Johnson Act Gambling Devices In The Absence Of A Tribal-State Compact Has Important Ramifications For The IGRA Regulatory Scheme

The question whether IGRA creates an exemption from the Johnson Act for gambling devices used in Class II gaming is one of considerable importance to gambling regulation in Indian country. As explained above, acting in response to concerns that tribal gaming could be infiltrated by organized crime or otherwise corrupted, Congress adopted a distinct regulatory approach to casino-style Class III gaming. In particular, Congress directed that Tribes could engage in such gaming only if they entered into compacts with States, which were viewed as possessing regulatory expertise with respect to such gambling, and only if those compacts were approved by the Secretary of the Inte-

rior. Congress's regulatory approach would be seriously compromised if Tribes could use Johnson Act gambling devices in Class II gaming, and thus without a tribal-state compact.

This question has particular significance when, as in this case and *Santee Sioux Tribe*, a Tribe and a State are unwilling or unable to enter into a Class III gaming compact. This Office has been informed that Tribes in a number of States have used Lucky Tab II or other Class II gaming devices without a tribal-state compact. The question can also have significance even when a Tribe and a State *have* entered into a compact. Some compacts, including many in California and Montana, limit the number of slot machines or other Class III gambling devices that the Tribe may install. Under the decision below and the Ninth Circuit's decision in *103 Electronic Gambling Devices*, a Tribe could circumvent those limits by installing slot-machine-type devices or other gambling devices on the theory that they are mere "technologic aids" to Class II gaming.[5] Similarly some compacts, including those in Arizona, Michigan, Wisconsin, California, and New Mexico, require Tribes to share a portion of their Class III gaming revenue with the State. A Tribe could attempt to evade such requirements by replacing some, or all, of its Class III gambling devices with comparable machines of the sort at issue here, characterizing them as mere

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[5] See, *e.g.*, Steve Wiegand, *Casinos could hold cards in talks*, Sacramento Bee (Nov. 17, 2003) (noting the potential attractiveness of Class II devices for gaming Tribes in California, where "15 [Tribes] are at or near the 2,000-machine limit" for Class III devices under their compacts with the State, and quoting the NIGC Chairman as stating that "we're going to see a significant number of Class II machines at California casinos in the near future"); Marian Green, *Class II Games Come of Age*, SlotManager (Sept. 2003) (*http://www.gemcomm.com/Publications/currentpubs/slotmanager*, visited Nov. 19, 2003) ("Gaming demand is so great in California that often all the Class III games are occupied by players. Operators sometimes will add Class II games, which don't fall under tribal state compact regulations, to pick up the slack.").

"technologic aids" to the playing of traditional bingo, paper pull- tabs, or other Class II games.[6]

* * *

In sum, because the Tenth Circuit's holding on the applicability of the Johnson Act to Class II technologic aids is contrary to the text, history, and purposes of IGRA, conflicts with the Eighth Circuit's holding in *Santee Sioux Tribe*, and has significant implications for Indian gaming regulation, this Court's review is clearly warranted.[7]

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[6] See, *e.g.*, John Simerman, *Casinos far from likely to pay more*, Contra Costa Times (Oct. 19, 2003) (noting that Tribes may turn to Class II games to avoid compact provisions requiring revenue sharing with States).

[7] There is no occasion in this case for the Court to decide whether the Magical Irish machine could qualify as a permissible technologic aid for the playing of paper pull-tabs within the meaning of the definition of Class II gaming in 25 U.S.C. 2703(7)(A) standing alone, because any Class II gaming using such a purported aid would, in any event, be prohibited by the Johnson Act and by 25 U.S.C. 2710(b)(1)(A), which makes the Johnson Act applicable to Class II gaming on Indian lands. We note, however, that there is no indication in IGRA's legislative history that Congress contemplated that devices such as Magical Irish were to be included within the scope of aids to Class II gaming. To the contrary, as explained above (see pp. 10-14, *supra*), the legislative history of IGRA, like the text of Section 2710(b)(1)(A), makes clear that devices may be used as electronic, computer, or other technologic aids only if they are "otherwise legal" under federal law, specifically including the Johnson Act. See S. Rep. No. 466, *supra*, at 12. Moreover, as also noted above (see p. 13, *supra*), the only specific example of aids discussed in the Senate Report involved the connection of gaming sites operated by different Tribes through the use of computers and telecommunications technology that clearly would not constitute gambling devices—and that, as the Report pointed out, would "not change the fundamental characteristics of the bingo or lotto games" and would be "readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players." S. Rep. No. 466, *supra*, at 9. The same cannot be said of Magical Irish—a machine designed to resemble a slot machine—when compared to the traditional game of paper pull-tabs.

Consistent with this understanding, the regulations first promulgated by the NIGC after passage of IGRA made clear that Johnson Act gambling devices were excluded from the definition of Class II aids. See 25

B. The Johnson Act's Definition Of "Gambling Device" Does Not Exclude Devices Such As Magical Irish That Read, Display, and Dispense Winning Receipts From A Removable Paper Roll

Because the Tenth Circuit held that the Johnson Act does not apply to Class II technologic aids and that Magical Irish is a technologic aid, it did not reach the question whether Magical Irish is a Johnson Act gambling device, although the question was decided by the district court and raised by the government on appeal. See App., *infra*, 49a; Gov't C.A. Br. 13-21. The Eighth Circuit, given its contrary holding in *Santee Sioux* with respect to the relationship between IGRA and the Johnson Act, did reach the question whether the Lucky Tab II machine in that case is a Johnson Act gambling device, and held that it is not. See 324 F.3d at 612-613. The government is seeking this Court's review of the Eighth Circuit's holding on that question and suggests that the two cases be consolidated for purposes of argument. In view of the similarity of the Magical Irish and Lucky Tab II machines, as well as the similarity of the lower courts' reasoning on the question whether they satisfy the Johnson Act's

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C.F.R. 502.7(b) (1993) (requiring that an aid be "readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile"); 25 C.F.R. 502.8 (1993) (defining "electronic or electromechanical facsimile" to mean "any gambling device as defined in 15 U.S.C. 1171(a)(2) and (3)"). As revised in July 2002, the NIGC's regulations no longer define "electronic or electromechanical facsimile" by reference to the Johnson Act and add "pull tab dispensers and/or readers" to the examples of "electronic, computer, or other technologic aids." See 67 Fed. Reg. 41,168, 41,172 (promulgating 25 C.F.R. 502.7(c) and 502.8). To the extent that those regulatory changes reflect a view that the Johnson Act does not apply to gambling devices used as purported aids to Class II gaming, see *id.* at 41,169-41,171; but see *id.* at 41,173-41,174 (dissenting views of NIGC Chairman Deer), that view is contrary to the text and history of IGRA and does not represent the position of the United States. The Johnson Act is a federal criminal statute enforced by the Department of Justice, not the NIGC, and for that reason the court of appeals declined to accord deference to the NIGC's views regarding its application. See App., *infra*, 21a.

definition of a gambling device, the Court may wish to resolve that question in this case as well as *Santee Sioux Tribe*, rather than remanding the case to the Tenth Circuit if the Court holds that IGRA does not provide an implied exemption from the Johnson Act.

1. The Applicability Of The Johnson Act Does Not Turn On Arbitrary Distinctions About Whether Or Not A Player's Entitlement To Money Is Determined Solely By The Mechanical Operations Of The Machine

In *Santee Sioux Tribe*, the Eighth Circuit held that Lucky Tab II, which operates essentially like Magical Irish, does not satisfy the Johnson Act's definition of a "gambling device," reasoning that a player "does not become entitled to receive money or property as a result of the *machine*'s application of an element of chance." 324 F.3d at 612. The Eighth Circuit considered it dispositive that winners and losers are determined by the sequence of pull-tabs on the preprinted paper roll inserted into the machine. *Ibid.* The Eighth Circuit acknowledged that, if the winners and losers were instead determined by a computer inside the Lucky Tab II, an otherwise identical machine could qualify as a Johnson Act gambling device. *Ibid.* Similarly here, the district court held that Magical Irish is not a Johnson Act gambling device because it "dispenses preprinted prearranged pull tabs" and "cannot change the outcome of the game." App., *infra*, 13a. Contrary to those courts' view, the reach of the Johnson Act does not turn on arbitrary distinctions as to whether winners and losers are determined by a fixed component of a device as opposed to a removable component.

a. As noted above, the Johnson Act defines a "gambling device" to include:

> any * * * machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection

> with gambling, and * * * (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

15 U.S.C. 1171(a)(2).

The Magical Irish and Lucky Tab II machines fall squarely within that definition. The lower courts did not question that those machines are "designed and manufactured primarily for use in connection with gambling." A player becomes "entitled to receive * * * money or property" when the machine dispenses a winning pull-tab, which can be redeemed for money. Whether the machine dispenses a winning pull-tab to a given player turns on various "element[s] of chance," including the number and order of winning and losing pull-tabs on the paper roll within the machine, the number of times previous players have played the machine, and the number of times the current player chooses to play. Indeed, it is those characteristics that render the machine a gambling device from the player's perspective as well as the casino operator's perspective.

b. Nothing in Section 1171(a)(2)(B) requires the "element of chance" to be "appli[ed]" in any particular manner to determine whether a player wins or loses. Section 1171(a)(2)(B) thus does not require, as the lower courts supposed, that winners and losers be determined through the operation of a permanent component of the device (such as a computer), as distinguished from a removable component (such as a roll of paper pull-tabs). Perhaps, if the phrase "as the result of the application of an element of chance" were rewritten and relocated so as to modify the phrase "operation of [the machine]," Section 1171(a)(2)(B) might be understood as requiring the machine itself or its operation to apply the element of chance. Even then, however, the definition would be satisfied, because once the pull-tab roll is inserted into the Magical Irish or Lucky Tab II

machine, it is integral to both the machine and its operation. See *Santee Sioux Tribe*, 324 F.3d at 610 ("Without a roll of paper pull-tabs in place, the [Lucky Tab II] machine cannot function —it will not accept money or display any symbols."). But whatever the proper interpretation of that hypothetical statute, the phrase "as the result of the application of an element of chance" in Section 1171(a)(2)(B), as written, modifies the phrase "may become entitled to receive," the clause that it immediately follows, not "machine" or "operation of [the machine]." See *Barnhart* v. *Thomas*, No. 02-763, slip op. 6-7 (Nov. 12, 2003) (discussing the rule of the last antecedent). As explained above, there is no question that there is an "element of chance" in whether a player of Magical Irish or Lucky Tab II "become[s] entitled" to receive money.

Any requirement that winners and losers be determined by something intrinsic to the mechanical features of device would also be inconsistent with the statutory example of "roulette wheels and similar devices." 15 U.S.C. 1171(a)(2). A roulette wheel, in and of itself, does not generate the numbers that determine whether a player has won or lost a game of roulette. Rather, those numbers are produced only with the addition of the external components of a roulette ball and an operator who spins the roulette wheel.

c. The legislative history of the Johnson Act, as amended in 1962 with the definition section at issue here, does not evince any congressional intent to confine its scope to devices that select winners and losers through some permanently installed component such as a computer. To the contrary, the House Report explains that Section 1171(a)(2) was designed to encompass an array of "[n]ew gambling machines" that did not satisfy the existing statutory definition. H.R. Rep. No. 1828, 87th Cong. 2d Sess. 6 (1962); see *ibid.* (expressing concern that racketeering interests were developing gambling devices not covered by the existing definition). As the D.C. Circuit contemporaneously observed, Section 1711(a)(2)'s broad definition of gambling

devices "proceeded from a conscious purpose on the part of Congress to anticipate the ingeniousness of gambling machine designers." *Lion Mfg. Corp.* v. *Kennedy*, 330 F.2d 833, 837 (D.C. Cir. 1964).

Consistent with that purpose, the language of Section 1171(a)(2) serves to ensure that the Johnson Act, while comprehensive in the field that it regulates, reaches only *gambling* devices, not other types of machines that accept or dispense money or property. The requirements that the machine be "designed and manufactured primarily for use in connection with gambling" and that a player receive, or become entitled to receive, money or property "as the result of the application of an element of chance" distinguish gambling devices subject to the Johnson Act from both (1) change-making or vending machines, in which the user enters into a transaction that entitles him to receive money or property of comparable value to that which he has deposited, and (2) machines that enable a person to receive money or property as a result not of chance, but of his skill in playing a game, such as "a coin-operated bowling alley, shuffleboard, marble machine (a so-called pinball machine), or mechanical gun," 15 U.S.C. 1178(2).

It would be inconsistent with the congressional purpose underlying Section 1171(a)(2) to conclude that Magical Irish and Lucky Tab II are not gambling devices based on distinctions that are not even suggested, much less compelled, by the statutory text. Those machines are indisputably designed and manufactured primarily for use in gambling, and they indisputably entitle a winning player to receive money as the result of the application of an element of chance. Nothing more is required to satisfy the definition of a gambling device under Section 1171(a)(2)(B).[8]

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[8] The Eighth Circuit also stated that Lucky Tab II could not qualify as a gambling device under Section 1171(a)(2)(A) because the device itself does not dispense money or property directly to a winning player. See 324 F.3d at 612; 15 U.S.C. 1171(a)(2)(A) (defining gambling device as, *inter*

2. The Ninth Circuit Has Held That The Johnson Act Applies To Devices Similar To Magical Irish And Lucky Tab II

The lower courts' holdings that Magical Irish and Lucky Tab II are not Johnson Act gambling devices cannot be reconciled with the Ninth Circuit's decision in *United States* v. *Wilson*, 475 F.2d 108 (1973) (per curiam), aff'g 355 F. Supp. 1394 (D. Mont. 1971). In *Wilson*, the court of appeals upheld the application of the Johnson Act to a device that was similar in relevant respects to Magical Irish and Lucky Tab II.

The "Bonanza" machine in *Wilson*, like Magical Irish and Lucky Tab II, incorporated into its design a removable paper roll of preprinted coupons of varying values. Before inserting a coin into the machine, the player could view the next coupon to be dispensed. After that coupon was dispensed, the next coupon was exposed, and the player could decide whether to insert another coin. A player could redeem a winning coupon at the establishment where the machine was located. See 355 F. Supp. at 1396.

The question on appeal was whether a winning player of the Bonanza machine became entitled to money or property through the operation of an "element of chance" even though he could see the coupon that would be dispensed to him. The Ninth Circuit answered that question in the affirmative. The court explained that "most players put their first 25 cents in the 'Bonanza' machine because of the 'element of chance' that the next coupon, thus exposed, would entitle them, for another 25 cents, to a guaranteed payment of 50

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alia, a machine that "when operated may deliver, as the result of the application of an element of chance, any money or property"). The Eighth Circuit was mistaken, because a winning pull-tab, when dispensed by a Magical Irish or Lucky Tab II machine, constitutes property. In any event, Section 1171(a)(2)(B), the provision discussed in the text, requires only that a winning player become entitled to receive money or property, not that the machine itself deliver that money or property.

cents to $31.00." 475 F.2d at 109. It is thus evident in the Ninth Circuit's holding that the "element of chance" in the playing of the Bonanza machine could arise in part from the order of coupons on the paper roll.[9]

In the Ninth Circuit, therefore, the Johnson Act would apply to a machine, such as Bonanza, Magical Irish, or Lucky Tab II, that enables a player to gamble on whether the next item (*e.g.*, coupon, ticket, or pull-tab) that a machine dispenses from a preprinted paper roll will be a winner. In the Eighth Circuit, as well as under the district court's decision in this case, the Johnson Act would not apply to such a machine. As explained below, that disagreement warrants this Court's resolution.

3. The Question Whether The Johnson Act Can Be Circumvented By Devices Such As Magical Irish And Lucky Tab II Is Important Both Inside And Outside Indian Country

The question whether machines such as Magical Irish and Lucky Tab II satisfy the Johnson Act's definition of a gambling device has important ramifications outside as well as inside Indian country. As noted above, the Johnson Act prohibits the manufacture, sale, transportation, possession, or use of gambling devices not only within Indian country, but also within the District of Columbia, federal enclaves,

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[9] The Ninth Circuit in *Wilson* also affirmed the district court's determination that the Johnson Act's definition of a gambling device was satisfied by a "bead ball" machine. See 475 F.2d at 109. That machine dispensed plastic beads, each of which contained a piece of paper bearing a combination of numbers. A player would insert a coin into the machine, turn a handle on the machine until a ball was dispensed, open the ball to retrieve the paper, and compare the number with a list of winning numbers posted on the machine. If the player received a winning number, he would be paid by the establishment where the machine was located. See 355 F. Supp. at 1395. Whether a player won or lost was determined not by the mechanical features of the machine in isolation, but by the preprinted paper inside each bead and by the order in which the beads were dispensed.

and federal possessions. See 15 U.S.C. 1175(a). It also prohibits the interstate shipment of gambling devices to and from places in which they are illegal under local law. See 15 U.S.C. 1172(a).

If, therefore, the Johnson Act were understood not to apply to devices such as Magical Irish and Lucky Tab II, such devices could be introduced not only into additional areas of Indian country, but also into other areas of federal jurisdiction identified in Section 1175(a). Moreover, although the possession or use of such devices might be prohibited under a State's own laws, the United States would be unable to prosecute the shipment of the devices into the State under Section 1172(a). As a result, the important role that Congress intended for the Johnson Act in reinforcing state prohibitions of gambling devices could be thwarted.

The ramifications of the technical and narrow definition of a Johnson Act gambling device applied by the Eighth Circuit in *Santee Sioux Tribe* and the district court in this case would not be confined to devices similar in design to Magical Irish and Lucky Tab II. If, as those courts' reasoning suggests, a gambling device must deliver the element of chance solely through an internal computer or another such permanent component, "the ingeniousness of gambling machine designers," *Lion Mfg. Corp.*, 330 F.2d at 837, could be expected to produce an array of devices in which the element of chance is supplied through other means. Accordingly, the lower courts' decisions holding that the Johnson Act does not apply to devices such as Magical Irish and Lucky Tab II threaten to undermine the effectiveness of the Johnson Act both inside and outside Indian country.

CONCLUSION

The petition for a writ of certiorari should be granted and the case should be consolidated for argument with *United States* v. *Santee Sioux Tribe of Nebraska*, in which the government is also filing a petition for a writ of certiorari.

Respectfully submitted.

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NOVEMBER 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-5066

SENECA-CAYUGA TRIBE OF OKLAHOMA; FORT SILL APACHE TRIBE OF OKLAHOMA; NORTHERN ARAPAHO TRIBE OF WYOMING; DIAMOND GAME ENTERPRISES, INC., PLAINTIFFS-APPELLEES

v.

NATIONAL INDIAN GAMING COMMISSION; JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES; UNITED STATES DEPARTMENT OF JUSTICE; THOMAS SCOTT WOODWARD, UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF OKLAHOMA, DEFENDANTS-APPELLANTS

April 17, 2003.

Before HENRY, MCWILLIAMS, and LUCERO, Circuit Judges.

HENRY, Circuit Judge.

This case requires us to interpret the Johnson Act, 15 U.S.C. §§ 1171-1178, and the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2719. Appellants are the federal agencies and officials who threatened to prosecute three Native American tribes for use of a device called the Magical Irish Instant Bingo Dispenser System, which we will call "the Machine." Appellees are the three tribes, as

well as the corporation that manufactured and supplied the Machine.

In response to the threat of prosecution, the appellees filed a complaint in federal district court. Subsequently, the district court granted the appellees' motion for a declaratory judgment stating that the Machine (1) is *not* an illegal "gambling device" under the Johnson Act; and (2) *is* a permissible technologic aid to Class II gaming under IGRA. This appeal followed.

Our opinion proceeds in four steps. Part I summarizes the applicable statutory framework. Part II summarizes the background of this dispute. Part III assesses, and rejects, the two threshold arguments raised by appellees: mootness and collateral estoppel. Part IV evaluates the district court's judgment on the merits in two sections. The first section analyzes the relationship between IGRA and the Johnson Act and concludes that if the Machine is properly classified as an IGRA Class II technologic aid, then the Machine is necessarily both authorized by IGRA and protected from Johnson Act scrutiny. The second section, following the D.C. Circuit, concludes that the Machine is indeed an IGRA Class II technologic aid. Accordingly, although our reasoning differs somewhat from the district court, we affirm the district court's decision.

I. THE STATUTORY FRAMEWORK

We begin by summarizing the applicable statutory framework. We discuss the Johnson Act and then IGRA.

The Johnson Act

The Johnson Act, as amended in 1962, makes criminal, both outside and inside "Indian country,"[1] the possession,

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[1] "Indian country" is a term of art. The United States Code defines "Indian country" as:

use, sale, or transportation of any "gambling device." 15 U.S.C. § 1175(a). The Johnson Act defines a "gambling device" as any

> slot machine . . . and other machine or mechanical device (including but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

Id. § 1171(a)(1), (2). Courts have construed the Johnson Act broadly, concluding that the statute's "gambling device" language was enacted to "anticipate the ingeniousness of

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(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation;

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. In contrast, "[t]here is no single statute that defines 'Indian' for all federal purposes." *Felix H. Cohen's Handbook of Indian Law* 23 (1982 ed.). Moreover, that term has been somewhat supplanted in recent years by the term "'Native American,' which has "become a part of the common parlance." *"Dawavendewa* v. *Salt River Project Agr. Imp. and Power Dist.*, 154 F.3d 1117, 1118 n.1 (9th Cir. 1998). We therefore strike a balance by using the statutory term "Indian country" to avoid confusion, but using the term "Native American" elsewhere in this opinion.

gambling machine designers" in "separating the public from its money on a large scale," *Lion Mfg. Corp.* v. *Kennedy*, 330 F.2d 833, 836-37 (D.C. Cir. 1964), and therefore to cover a wide variety of machines. *See* James L. Rigelhaupt, Jr., *What Constitutes Gambling Device Within Meaning of 15 U.S.C.A. Sec. 1171(a) So as to be Subject to Forfeiture Under Gambling Devices Act of 1962 (15 U.S.C.A. secs. 1171-1178)*, 83 A.L.R. Fed. 177, 1987 WL 419639 (1987 & Supp. 2000) (collecting cases).

The Indian Gaming Regulatory Act (IGRA)

Following the Supreme Court's decision in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987), which "authorized gaming on federally recognized Indian country, Congress enacted the Indian Gaming Regulatory Act. . . also known as IGRA." *United States* v. *162 MegaMania Gambling Devices*, 231 F.3d 713, 717 (10th Cir. 2000) (internal citations omitted). IGRA "provides a comprehensive regulatory framework for gaming activities on Indian country which seeks to balance the interests of tribal governments, the states, and the federal government." *Pueblo of Santa Ana* v. *Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997) (internal quotation marks omitted). Towards that end, IGRA authorized the creation within the United States Interior Department of a three member National Indian Gaming Commission. *See* 25 U.S.C. § 2704. The NIGC's broad powers include inspecting tribes' books and records, approving tribal-state pacts, levying and collecting civil fines, monitoring and shutting down unauthorized tribal games, and promulgating regulations and guidelines to implement IGRA. *See* 25 U.S.C. §§ 2705-06, 2713. IGRA divides Native American gaming into three mutually exclusive categories: Classes I, II, and III. 25 U.S.C. § 2703. The three classes differ as to the extent of federal, tribal, and state oversight. *See United Keetoowah*

Band of Cherokee Indians v. *Oklahoma*, 927 F.2d 1170, 1177 (10th Cir. 1991).

Class I

Class I gaming includes traditional Native American "social games played in connection with 'tribal ceremonies or celebrations.'" *Id.* (quoting 25 U.S.C. § 2703(6)). These traditional games include "'stick or bone' games, rodeos, and horse races played in conjunction with tribal celebrations, ceremonies, pow wows, or feasts."[2] Tribes possess "*exclusive jurisdiction*" to regulate Class I gaming. *Keetoowah*, 927 F.2d at 1177 (quoting 25 U.S.C. § 2710(a)(1)) (emphasis supplied).

Class II

Class II gaming includes "the game of chance commonly known as bingo (whether or not electronic, computer or other technologic aids are used in connection therewith) . . . including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo. . . ." 25 U.S.C. § 2703(7)(A). IGRA excludes from the definition of Class II gaming "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." *Id.* at § 2703(7)(B)(ii). Class II gaming may be conducted in Indian country without a tribal-state compact. *See id.* §§ 2703(7) & 2710(b)(1). Tribes may engage in, or license and regulate, Class II gaming on land within a given tribe's territorial boundaries if three conditions are met: (1) "such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity," (2) "such gaming is not otherwise specifically prohibited on Indian country by Federal law," and (3) "the governing body of the Indian tribe

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[2] Edward P. Sullivan, *Reshuffling the Deck: Proposed Amendments to the Indian Gaming Regulatory Act*, 45 Syracuse L. Rev. 1107, 1126 (1995).

adopts an ordinance or resolution which is approved by the [Chairman of the NIGC]." *Id.* § 2710(b)(1)(A)-(B). Class II games are *regulated by the [NIGC]*." *MegaMania*, 231 F.3d at 718 (citing 25 U.S.C. § 2710(b)) (emphasis supplied). Congress made no reference in IGRA to the relationship between the Johnson Act's strictures and IGRA's authorization of the use of technologic aids to Class II gaming. Nor has Congress amended the Johnson Act to clarify this relationship.

Class III

Class III is a residual category: under IGRA, all gaming activity other than Class I and II gaming is Class III gaming. *Id.* § 2703(8). Examples of Class III gaming include "any banking card games, including baccarat, chemin de fer, or blackjack (21)," and "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." *Id.* § 2703(7)(B)(i)-(ii). IGRA provides that the Johnson Act's prohibitions "shall not apply to any gaming conducted under a [t]ribal-[s]tate compact that" is entered into between "[a]ny Indian tribe having jurisdiction over the Indian lands upon which a Class III gaming activity is being conducted" in "a state in which gambling devices are legal." *Id.* § 2710(d)(3), (6). Class III gaming authorized by a tribal-state compact is regulated by the given compact. However, Class III gaming not duly authorized may be subject to federal criminal prosecution under the Johnson Act. Thus, regulation of Class III gaming is *shared by the tribes, the states, the NIGC, and the Department of Justice.*

II. BACKGROUND

A. Factual Background

At the heart of this dispute is whether the game played with the Machine qualifies as the IGRA Class II game of pull-tabs. Therefore, we first describe the game of pull-tabs

as played in its traditional, manual form. We then describe the game that is played with the Machine.[3]

1. *Pull-tabs*

In the game of pull-tabs as it is typically played, players compete against one another to obtain winning cards from a set of cards, known as a "deal." A typical deal contains up to 100,000 cards and a predetermined number of winning cards. Each individual pull-tab within a deal in a small, two-ply paper card. When the top layer of an individual card is removed, the bottom layer reveals a pattern of symbols indicating whether the player has won a prize. Winning cards are randomly spaced within preprinted, prearranged deals which are stored in boxes or divided into rolls. One deal consists of all of the pull-tabs in a given game that could possibly be purchased. A single game of pull-tabs is complete only when all pull-tabs within a given deal have been sold.

To participate in the game of pull-tabs, a player must purchase an individual tab from a clerk or dispenser. The clerk or dispenser gives the next tab in the preprinted roll to the player. The player must then open the tab to see if it contains a winning combination and present any winning tabs to a gaming hall clerk to obtain the corresponding prize.

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[3] The factual background is drawn primarily from paragraphs 16-23 of "Plaintiffs' Proposed Findings of Fact" as adopted by the district court, *see* Aplts' App. at 220, and from undisputed facts established at the preliminary injunction hearing, *see* Aplts' App. at 15-209 (Hr'g on Plaintiffs' Mot. for Prelim. Injunction August 30, 2001). Both parties failed to satisfy the requirement that they designate the adopted findings of fact as part of the appellate record. *See* Fed. R. App. P. 30(a)(1)(B)-(C); 10th Cir. R. 30.1(A)(1) and 30.2(A)(1). Nonetheless, because the adopted findings of fact are part of the ruling before us, we sua sponte designate them as part of the record on appeal. *See* Fed. R. App. P. 10(e)(2)(C).

2. *The Magical Irish Instant Bingo Dispenser System (The Machine)*

The Machine is an electro-magnetic dispenser manufactured by plaintiff-appellee Diamond Game Enterprises. Three physically separate components constitute the Machine—the dispenser, the base, and the verifier. The Machine dispenses paper pull-tabs from a roll of a maximum of 7,500 tabs that are part of a larger pull-tab deal. Other rolls within the same deal may be dispensed by another dispenser or a gaming hall clerk.

The Machine is mounted in front of fluorescent lights that illuminate the Machine. When a player inserts money into the Machine and presses the button marked "DISPENSE," the Machine cuts the next pull-tab card from the pre-printed roll within its dispenser compartment and drops the tab into a tray for the player to receive.

The Machine has a "verify" feature that allows players to see the results for a given pull-tab posted on a video display. When this feature is enabled, the Machine's display screen scans a bar code that has been previously printed on the back of a paper tab. After the tab is dispensed, the screen displays the contents of the paper tab on a video screen approximately six seconds later. The video screen depicts a grid that is similar in appearance to that of a slot machine.

Whether or not the "verify" function is enabled, any winning tabs dispensed by the Machine must be presented for in-person inspection by a gaming hall clerk before the player receives payment. The clerk must confirm that the paper pull-tab contains a winning prize, and only then may the clerk award the appropriate (pecuniary) prize.

The game played with the Machine can be a high-stakes, high-speed affair. A winning ticket pays up to $1,199.00 per

one-dollar play. When working properly, the Machine completes one play every seven seconds.

3. *The Tribes' Use of the Machine*

Each of the three appellee tribes—the Seneca-Cayuga Tribe of Oklahoma, the Fort Sill Apache Tribe of Oklahoma, and the Northern Arapaho Tribe of Wyoming—is authorized by the NIGC to conduct gaming operations on its reservation. Each tribe entered into leasing agreements with Diamond Game for use of the Machine, and at least one of the tribes, the Seneca-Cayuga Tribe, used the Machine as part of its gaming operations.

B. Procedural Background

1. *The NIGC Advisory Opinion Letter and the Decision of the District Court for the District of Columbia in the Diamond Game case*

In January 2000, the three tribes requested an administrative opinion from the NIGC regarding the classification of the Machine under IGRA. The resulting advisory opinion concluded that the game played with the Machine constitutes unauthorized Class III gaming.

In the advisory opinion, the NIGC relied heavily on a decision by the United States District Court for the District of Columbia involving another dispenser made by Diamond Game, the "Lucky Tab II." Like the Machine, the Lucky Tab II dispenses paper pull-tabs from a preprinted roll and displays the contents of the pull-tab on a video screen. However, unlike the Machine, the Lucky Tab II does not permit the user to disable the "verify" feature and is one integrated physical unit. On June 23, 1998, the United States District Court for the District of Columbia held that the Lucky Tab II is an IGRA Class III game not authorized for use by tribes in their gaming operations without specific compacts between the tribes and the states in which their

operations are located.[4] The NIGC's advisory opinion reasoned that the Lucky Tab II "closely parallels [the Machine]," and that the district court's opinion regarding the Lucky Tab II "provides clear guidance to determine the classification for the [Machine]."[5]

2. *The Complaint*

Following the issuance of the NIGC's opinion, the United States Attorney for the Northern District of Oklahoma threatened to bring an enforcement action against the three tribes for conducting unauthorized use of gambling devices in violation of the Johnson Act. In response to this threat of prosecution and the NIGC's advisory opinion, the tribes, joined by Diamond Game, filed the federal district court complaint in this case. The complaint sought two forms of relief: a declaratory judgment stating that the pull-tabs game as played with the Machine constitutes Class II gaming under IGRA and is not a "gambling device" proscribed by the Johnson Act; and an injunction preventing the federal authorities from taking the threatened enforcement action against the three tribes.

3. *The District Court Hearing*

On August 30, 2000, the district court conducted an evidentiary hearing, during which each side presented testimony from expert witnesses. During the hearing, the Machine and the Lucky Tab II were displayed. The government argued that the Machine is virtually identical to the Lucky Tab II and that both devices should be classified as Class III devices. In so arguing, the government asserted that "there is no[ ] . . . legal distinction or difference to be

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[4] *Diamond Game Enterprises, Inc.* v. *Reno*, 9 F. Supp. 2d 13 (D.D.C. 1998).

[5] Aplts' App. at 11 (Letter from NIGC General Counsel Kevin Washburn, dated Feb. 29, 2000).

drawn" between the Machine and the Lucky Tab II, and that "fundamentally, the Machine and Lucky Tab II games are the same."[6]

4. *The District Court's Rulings*

The district court issued three rulings relevant to this appeal: an oral ruling on August 30, 2000, and two rulings on February 20, 2001, one oral, and one in writing.

a. *August 30, 2000 Oral Ruling*

At the close of the evidentiary hearing, the district court made the following oral findings regarding the classification of the Machine under IGRA:

> The [Machine] is simply a dispenser of Pull-Tabs. It's not a Class II gaming device, nor a Johnson Act device. The [Machine] simply takes a deal, which is a roll of Pull-Tabs, which may be put in several rolls, and dispenses them at various locations. This deal could be played without the dispenser. In other words, somebody could sit at a ticket window and sell the Pull-Tabs individually. It wouldn't change the outcome of the game, whether they were sold over-the-counter or put out by the dispenser.
>
> The Pull-Tab tickets are predetermined at the time they are printed, outside the player's presence. When the Pull Tab is purchased, the person purchasing the Pull-Tab is competing with all other persons in the deal. The Pull-Tab is printed before the game is ever played.
>
> The dispenser does not select the order of dispensing the Pull-Tab tickets, that is determined by where they

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[6] Aples' Br. at 9 (quoting Defendants' Response to Mot. for Prelim. Injunction, at 10).

> are on the roll. The dispenser does not determine what is printed on the tickets. The dispenser does not accumulate any winnings, it does not make change of any kind, it doesn't contain a random number generator; in other words, there is nothing inside the machine that determines who wins. *It's just a technologic aid to dispensing Pull-Tabs.* The winner is determined by the ticket being taken to a person, the person looking at the ticket, and then paying if the ticket is a winner.
>
> There is no application of an element of chance in the machine, the dispenser doesn't do that at all. The dispenser doesn't determine who the winner is. That is predetermined when the Pull-Tabs are printed at some other location before the game is ever played.[7]

b. *February 20, 2001 Oral Ruling*

On February 20, 2001, the district court made the following oral finding regarding the Johnson Act's applicability to the Machine:

> [T]he Court finds that the [Machine] is not a Johnson Act [gambling] device. While the game of pull-tabs itself, by its nature contains an element of chance, no additional element of chance is applied by the [Machine]. The [Machine] merely dispenses preprinted prearranged pull-tabs and contains an additional optional monitor to help make the play of the game more enjoyable. The device cannot change the outcome of the game and a participant cannot win anything without first taking it to a cashier.[8]

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[7] Aplts' App. at 176-77 (Evidentiary Hr'g dated August 30, 2000) (emphasis supplied).

[8] Aplts' App. at 221 (Evidentiary Hr'g dated Feb. 20, 2001).

However, in its oral ruling, the district court refused to issue a permanent injunction.[9]

c. *February 20, 2001 Judgment Order*

On the same day, the district court entered its declaratory judgment that "[t]he [Machine] is a permissible Class II aid under [IGRA] and that it is not a gam[bl]ing device under the Johnson Act."[10] The instant appeal by the government ensued. In the meantime, however, events relevant to this appeal had continued to unfold.

5. *The D.C. Circuit Decision in the Diamond Game Case and the Switch to Lucky Tab II*

On November 3, 2000, the D.C. Circuit Court of Appeals held that the Lucky Tab II is an authorized IGRA Class II technologic aid, reversing the ruling by the United States District Court for the District of Columbia.[11] In the wake of the D.C. Circuit's holding and the legal uncertainty surrounding this appeal, appellees stopped using the Machine and transitioned towards exclusive reliance on the Lucky Tab II. By February 2002, none of the tribes were either using, or even still in possession of, a single Machine. The tribes state that they have no present intention to use the Machine in the future, and that they have turned their attention from the Machine to the Lucky Tab II and other pull-tab devices. Diamond Game states that it has ceased both manufacturing and providing the Machine to any tribes, and that, save one Machine it has retained for historical purposes, it no longer possesses any Machines. The government does not dispute these statements.

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[9] *See* Aplts' App. at 221-22.

[10] Aplts' App. at 8 (Judgment of the District Court entered February 20, 2001).

[11] *See Diamond Game Enterprises, Inc.* v. *Reno*, 230 F.3d 365, 369-70 (D.C. Cir. 2000).

III. THRESHOLD ISSUES

Before turning to our evaluation of the merits of the district court's rulings, we must first resolve two threshold issues raised by the appellees.

A. Mootness

Having secured a victory in the D.C. Circuit, the appellees have moved to dismiss this appeal as moot and vacate the district court's declaratory judgment. The appellees argue that the case is moot because they "cannot be prosecuted" by the government.[12] The appellees' advocacy on this point may be somewhat half-hearted; at oral argument, counsel for two of the three appellee tribes urged us to reach the merits of this appeal. Nonetheless, because questions of mootness go to our jurisdiction, we are required to address this issue at the outset. *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 287, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000).

We review mootness questions *de novo*. *Faustin* v. *City & County of Denver*, 268 F.3d 942, 947 (10th Cir. 2001). "Constitutional mootness doctrine is grounded in the Article III requirement that federal courts [may] only decide actual, ongoing cases or controversies." *Building and Constr. Dep't* v. *Rockwell Int'l. Corp.*, 7 F.3d 1487, 1491 (10th Cir. 1993) (internal citations and quotation marks omitted). However, "the conditions under which a suit will be found constitutionally moot are stringent." *Id.*

The current status of this appeal does not meet those stringent conditions. Because appellees retain a "legally cognizable interest in the outcome," *id.*, the case is not moot. The appellees assert that their cessation of use of the Machine necessarily means that they can no longer be

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[12] Aples' Mot. to Dismiss Appeal as Moot and Vacate District Court Decision, at 4 (filed Feb. 7, 2002).

prosecuted under the Johnson Act. This assertion is incorrect. Affidavits submitted by the appellees establish that the Machines were being supplied by Diamond Game to Native American tribes through at least November 2000, and were being used on certain of the appellee tribes' properties as recently as December 2001. The Johnson Act prohibits the possession, sale, transportation, or use of any gambling device in Indian country. 15 U.S.C. §§ 1175-76. The statute of limitations for Johnson Act prosecutions is five years. *See* 18 U.S.C. § 3282. Therefore, but for the legal impediment presented by the district court's February 20, 2001 declaratory judgment, the government would appear to have until at least 2006 to initiate a prosecution against the tribes, and until at least 2005 to prosecute Diamond Game.

Two additional factors counsel against dismissing the appeal as moot. First, it is not "*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *S. Utah Wilderness Alliance* v. *Norton*, 301 F.3d 1217, 1236 n.17 (10th Cir. 2002) (quoting *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216, 222, 120 S. Ct. 722, 145 L. Ed. 2d 650 (2000) (emphasis in original, internal quotation marks omitted)). Here, the plaintiffs/appellees shoulder the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Adarand*, 528 U.S. at 222, 120 S. Ct. 722; *see also City of Erie*, 529 U.S at 287-88, 120 S. Ct. 1382 (imposing this burden on the party that was the plaintiff below). As appellees concede, it is "technically possible" for the tribes to resume usage of the Machines. Aples' Mot. to Dismiss at 15. Indeed, Diamond Game nowhere represents that it would be unable to resume manufacturing and marketing the Machine; it is thus far from "absolutely clear" that the use, sale, possession, or transportation of the Machines under Diamond Game's proprietary control cannot be reasonably expected to

recur. *Accord United States* v. *Generix Drug Corp.*, 460 U.S. 453, 456 n. 6, 103 S. Ct. 1298, 75 L. Ed. 2d 198 (1983) ("Respondent has argued that the case is moot because almost its entire store of products containing the disputed active ingredients is no longer saleable, and in the future it intends only to sell [authorized] drugs. . . . The possibility that respondent may change its mind in the future is sufficient to preclude a finding of mootness.").

Second, we perceive a degree of strategic manipulation of the federal appellate courts by the appellees, who conceded in their supplemental briefs and at oral argument that the decision to reallocate resources from the Machine to the Lucky Tab II was driven by the D.C. Circuit decision issued during the pendency of this case. In *City of Erie*, the Supreme Court based its refusal to dismiss for mootness in part on a concern over strategic manipulation, concluding that the "interest in preventing litigants from attempting to manipulate [appellate] jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness." 529 U.S. at 288, 120 S. Ct. 1382. Appellees argue that *City of Erie* is distinguishable because the Supreme Court there, in declining to find mootness, specifically applied its reasoning to the Court's custom of leaving intact *state* court rulings that on appeal become moot. Appellees therefore urge us to follow the federal appellate court custom, for cases that become moot on appeal, of vacating the district court's judgment. *See U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 24-25, 115 S. Ct. 386, 130 L. Ed. 2d 233 (1994). We, however, read *City of Erie* as expressing a generalized concern about manipulation of an appellate court's jurisdiction to seal a favorable decision from review. Here, appellees' conduct, while presumably not in bad faith, nonetheless implicates the concern over post-trial manipulation.

We thus conclude that the appeal is not moot.

B. Collateral Estoppel

The second threshold issue we must resolve is whether, in the wake of the D.C. Circuit's *Diamond Game* decision, the government is barred by the doctrine of offensive collateral estoppel from arguing that the Machine is not an IGRA Class II technologic aid. *See* Aples' Br. at 21-24 (citing *Diamond Game*, 230 F.3d at 370). Offensive collateral estoppel describes claims such as those raised by the appellees, in which "'a plaintiff is seeking to [prevent] a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff.'" *Harvey* v. *United Transp. Union*, 878 F.2d 1235, 1243 n.13 (10th Cir. 1989) (quoting *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 329, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)).

An argument that the opposing party is estopped from litigating an issue must be timely raised. *Arizona* v. *California*, 530 U.S. 392, 410, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000). We have previously applied this rule to bar a party from raising an estoppel argument on appeal where that party was a victorious plaintiff in the district court and failed to timely raise its estoppel claim below. *See Harvey*, 878 F.2d at 1243 ("We hold that plaintiffs waived this issue preclusion claim by failing to invoke it timely.").

The D.C. Circuit's decision in favor of Diamond Game, a named plaintiff in both this and the D.C. Circuit case, was filed on November 3, 2000. *See Diamond Game*, 230 F.3d at 365. Thus, the D.C. Circuit's decision was issued well before the final hearing and February 20, 2001 judgment of the district court in this case. Nonetheless, appellees never raised their estoppel claim in the district court, first raising the issue in their opening appellate brief filed April 30, 2002.

As we said in *Harvey*, "[t]his simply is too late." 878 F.2d at 1243. Permitting such belated assertion of collateral estoppel arguments would "do[ ] nothing to vindicate two primary policies behind the doctrine, conserving judicial resources and protecting parties from 'the expense and vexation' of relitigating issues that another party previously has litigated and lost." *Harvey*, 878 F.2d at 1243 (quoting *Montana* v. *United States*, 440 U.S. 147, 153-54, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)). Accordingly, we hold that appellees have waived their estoppel argument. Although we do not reach the "merits" of the appellees' collateral estoppel argument, we note that nonmutual offensive collateral estoppel is generally not available against the federal government. *See United States* v. *Mendoza*, 464 U.S. 154, 159-62, 104 S. Ct. 568, 78 L. Ed. 2d 379 (1984). We turn now to the merits of the government's appeal.

IV. THE MERITS

Standard of Review

We review the district court's interpretation of federal statutes and regulations *de novo*, *MegaMania*, 231 F.3d at 718, and its findings of fact for clear error. *See* Fed. R. Civ. P. 52(a). In addition, although the district court's order did not distinguish between gaming in Indian country and non-Indian country, we construe the order to apply only to use, sale, possession, or transportation of devices used in Indian country because the threatened prosecution at issue in this case only involved devices possessed or used by, or sold or transported to, the appellee tribes.

Discussion

Our merits analysis divides into two sections. The first section analyzes the relationship between IGRA and the Johnson Act, specifically whether users of IGRA Class II technologic aids in Indian country may be subject to Johnson

Act liability. The second section analyzes whether the Machine is an IGRA Class II technologic aid.

A. Whether Users of IGRA Class II Technologic Aids on Indian Country May be Subject to Johnson Act Liability

1. *Lack of Controlling Precedent*

Appellees contend that it is "settled law" under this court's decision in *MegaMania*, 231 F.3d 713, that IGRA Class II technologic aids are insulated from the Johnson Act's ban on gambling devices. Aples' Br. at 16; Am. for Affirmance Br. at 7. That characterization is tempting because if accurate, it would considerably simplify our task. However, it overstates the case.

In *MegaMania*, we concluded that the "162 MegaMania" bingo game machine did not violate the Johnson Act. *See* 231 F.3d at 715. In reaching that conclusion, we first analyzed the question of how to classify the 162 MegaMania machine under IGRA and held that "MegaMania is not an electronic facsimile of, but is an aid to, the game of bingo." *Id.* at 725. "Accordingly," we stated, "MegaMania is *not excluded* from [IGRA]'s definition of a Class II game." *Id.* (emphasis supplied). We then stated in the sentence immediately following that "Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game [under IGRA], and is played with the use of an electronic aid." *Id.* The footnote accompanying that text stated that "our holding in this case . . . is limited to the MegaMania form of bingo currently at issue." *Id.* at 725 n. 9.

The appellees argue that under *MegaMania*, technologic aids to *all* enumerated Class II games beyond just bingo are insulated from the Johnson Act. However, as we have explained, we did not squarely reach that issue in *MegaMania*, nor have we done so in any subsequent decision. The

lack of clear legislative or judicial resolution of the relationship between the Johnson Act and IGRA Class II technologic aids has engendered "'uncertainty . . . among the [ ] tribes, states, and regulatory bodies as to which games are properly classified as Class II under [IGRA] . . . . where tribes offer Class II games that utilize 'technologic aids' as IGRA expressly permits [*and* . . . some of these games fall under the definition of 'gambling devices' under the Johnson Act.'"[13] *This* case, though, squarely presents the question of whether aids to those non-bingo games such as pull-tabs that are enumerated in 25 U.S.C. § 2703(7)(A) are protected from Johnson Act scrutiny, and we will address it.

2. *Reading the Johnson Act in Light of IGRA*

Our task is to interpret Congress's silence in the statutory text regarding the relationship between the Johnson Act and IGRA Class II technological aids. The prohibitions enacted in the 1962 amendments to the Johnson Act apply to all United States territories, including those in Indian country. *See* 15 U.S.C. § 1575. IGRA, enacted a quarter-century later, specifically excludes the Johnson Act from application to authorized Class III gaming, *see* 25 U.S.C. §§ 2710(d)(3), (6), but makes no statement one way or the other in the statutory text concerning the application of the Johnson Act to Class II technologic aids. Congress did not amend the Johnson Act at the time of the enactment of IGRA to clarify the extent to which the Johnson Act covers Class II gaming, nor has Congress done so since IGRA's enactment. Neither the parties' briefs nor our research have revealed any authority pre-dating the passage of IGRA that specifically

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[13] NIGC, *Comments*, Commissioners Elizabeth L. Homer and Teresa E. Poust, 67 Fed. Reg. 41,169 (June 17, 2002) (quoting Letter from the Chairman and Vice Chairman of the United States Senate Committee on Indian Affairs to the NIGC (dated July 10, 2000)).

addresses how the Johnson Act applied to the types of devices deemed by IGRA as Class II technologic aids.

In addition, no NIGC regulations exist on this issue to which we would owe any deference. Because the Johnson Act is a federal criminal statute enforced by the United States Department of Justice, we owe no deference to the NIGC's construction.[14] Moreover, even if we did defer to the NIGC on this issue, the NIGC has provided only limited guidance, issuing no amendments to the Code of Federal Regulations that address the relationship between the Johnson Act and IGRA Class II technologic aids. Although the individual commissioners did discuss the relationship between the Johnson Act and IGRA Class II aids in comments that accompanied amendments to the federal code of regulations, those comments were not included in the amended regulations, and they revealed that the commissioners remain divided on the issue.[15]

The government urges us to analyze whether, in the *absence* of IGRA, devices that fit within the ambit of authorized IGRA Class II technologic aids would violate the Johnson Act. However, contrary to the government's argument (and, apparently, to the district court's approach), the key inquiry is not how the Johnson Act would have applied to Class II gaming in Indian country independently of IGRA; instead, our view is that "[w]hat matters now is how the two are to be read together—that is, how two enactments by Congress over thirty-five years apart most

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[14] *See, e.g., Murphy Exploration & Prod. Co.* v. *Dept. of the Interior*, 252 F.3d 473, 478 (D.C. Cir. 2001).

[15] *Compare* Comments of NIGC Commissioners Homer and Poust, 67 Fed. Reg. 41,166-72, *with* Comments of NIGC Commissioner Montie E. Deer, *id.* at 41,172-74.

comfortably coexist, giving each enacting Congress's legislation the greatest continuing effect."[16]

With that aspiration in mind, we note that under IGRA, Class II games include "the game of chance commonly known as bingo (whether or not electronic, computer or other technologic aids are used in connection therewith) . . . including (if played in the same location) *pull-tabs*, lotto, punch boards, tip jars, instant bingo, *and other games similar to bingo* . . . ." 25 U.S.C. § 2703(7)(A) (emphasis supplied). IGRA further provides that "electronic, computer, or other technologic aids" to such games are Class II gaming, and therefore permitted in Indian country. *Id.*

Absent clear evidence to the contrary, we will not ascribe to Congress the intent both to carefully craft through IGRA this protection afforded to users of Class II technologic aids and to simultaneously eviscerate those protections by exposing users of Class II technologic aids to Johnson Act liability for the very conduct authorized by IGRA.[17] A better reading of the statutory scheme is that through IGRA, Congress specifically and affirmatively authorized the use of Class II technologic aids, subject to compliance with the other IGRA provisions that govern Class II gaming.

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[16] *United States* v. *103 Electronic Gambling Devices*, 223 F.3d 1091, 1101 (9th Cir. 2000).

[17] *Accord Comments* by NIGC Commissioners Homer and Poust, 67 Fed. Reg. 41,170 (June 17, 2002) ("[T]he Johnson Act has proven remarkably troublesome as a starting point in a game classification analysis."); *id.* at 41,168 ("The ingenuity of gaming designers, which was designed to be constrained by the Johnson Act, is arguably intended to be given freer reign by IGRA in the context of Class II gaming."). *Cf. United Keetoowah*, 927 F.2d at 1176 ("IGRA is a comprehensive and pervasive piece of legislation that in many respects preempts other federal laws that might apply to gaming.") (internal quotation marks omitted).

Moreover, by shielding Indian country users of IGRA Class II technologic aids from Johnson Act liability, this construction gives meaning to both statutes, rather than neutering one of legal import.[18] This understanding of the two statutes recognizes that the Johnson Act may remain a tool for criminal prosecution of conduct outside Indian country or conduct within Indian country not authorized by federal law, but that through IGRA, Congress spoke *specifically* to the federal government's regulatory scheme over certain forms of authorized gambling within Indian country.

This common-sense reading of the two statutes is directly supported by legislative history. The sole congressional committee report accompanying the passage of IGRA stated that

> [it] is the Committee's intent that with the passage of this act, no other Federal statute, such as those listed below [including "15 U.S.C. [§§] 1171-78," the Johnson Act] will preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands.

Indian Affairs Committee Report, S. Rep. No. 100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082 ("Committee Report") (emphasis supplied). Read in conjunction with Congress's inclusion in 25 U.S.C. § 2703(7)(A) of "pull-tabs" in a list of games "similar to bingo," this statement in the Committee Report is direct evidence that Congress did not intend the Johnson Act to apply to the use of Class II technologic aids in Indian country. *See Garcia* v. *United*

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[18] *See FCC* v. *Nextwave Personal Communications, Inc.*, 537 U.S. 293, 123 S.Ct. 832, 840, 154 L.Ed.2d 863 (2003) ("When two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") (internal quotation marks omitted).

States, 469 U.S. 70, 76, 105 S. Ct. 479, 83 L. Ed. 2d 472 (1984) ("[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.") (internal quotation marks omitted).[19]

This reading of Congress's intent is also supported by the goal identified in the enacted statutory text of providing a "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1); *see also* Committee Report, 1988 U.S.C.C.A.N. at 3079 (declaring the legislative aim of fostering tribes' use of modern technology in branching out their Class II gaming operations, "thereby enhanc[ing] the[ir] potential of increasing revenues"); *cf. Cabazon*, 480 U.S. at 216, 107 S. Ct. 1083 ("The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-governance, including its overriding goal of

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[19] *See also United States* v. *Nelson*, 277 F.3d 164, 186 (2d Cir. 2002) ("In making this inquiry, we rely principally on the reports of the legislative Committees involved in drafting the statute and in steering it through Congress [and] . . . . eschew reliance on the passing comments of one Member, and casual statements from the floor debates"), *cert. denied*, — U.S. ——, 123 S. Ct. 145, 154 L. Ed. 2d 54 (2002); *In re Kelly* 841 F.2d 908, 912 n.3 (9th Cir. 1988) ("[O]fficial committee reports [ ] provide the authoritative expression of legislative intent."); *Mills* v. *United States*, 713 F.2d 1249, 1252 (7th Cir. 1983) ("Committee reports represent the most persuasive indicia of Congressional intent with the exception, of course, of the [statute's] language."); William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 947 (3d ed. 2001) ("Most judges and scholars agree that committee reports should be considered as authoritative legislative history and should be given great weight.").

encouraging tribal self-sufficiency and economic development") (internal quotation marks omitted).

The understanding that Congress intended to insulate Class II technologic aids from Johnson Act liability is consistent with our statement in *MegaMania* that "Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game [under IGRA], and is played with the use of an electronic aid," 231 F.3d at 725, and with the D.C. Circuit's statement in *Diamond Game* that IGRA limits "the Johnson Act prohibition to devices that are neither Class II games approved by the [NIGC] nor Class III games covered by tribal-state compacts." 230 F.3d at 367.[20] Further, and somewhat ironically, this understanding is *also* consistent with the most recently expressed

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[20] *See also United States* v. *Burns*, 725 F. Supp. 116, 124 (N.D.N.Y. 1989) (concluding that "Congress intended that no federal statute should prohibit the use of gambling devices for bingo or lotto, which are legal class II games," that "IGRA makes 15 U.S.C. § 1175, and other statutes . . . inapplicable to class II bingo," and that IGRA's legislative history "indicates not that [such statutes are] preempted by the IGRA, but in fact that [they] remain in effect, except for [ ] potential application to class II gaming"), *aff'd sub nom*, *United States* v. *Cook*, 922 F.2d 1026 (2d Cir. 1991). *Cf. United States* v. *103 Electronic Gambling Devices*, 223 F.3d at 1101 (the Ninth Circuit concluding that "IGRA quite explicitly indicates that Congress did not intend to allow the Johnson Act to reach *But see United States* v. *Santee Sioux Tribe of Nebraska*, 324 F.3d 607, 611 (8th Cir. 2003) (stating that "the argument that the IGRA implicitly repeals the Johnson Act with respect to class II devices is not well taken, even though some version of this view has been expressed by several courts," and concluding that "the Tribe must not violate either act"); *Cabazon Band of Mission Indians* v. *Nat'l Indian Gaming Comm'n*, 14 F.3d 633, 635 n.3 (D.C. Cir. 1994) (stating that besides express repeal of Johnson Act for Class III gaming in IGRA Section 2710(d)(6), "'[t]here is no other repeal of the Johnson Act, either expressed or by implication,'" for Class III gaming) (internal quotation omitted); *Cabazon Band Mission Indians* v. *Nat'l Indian Gaming Comm'n*, 827 F. Supp. 26, 31 (D.D.C. 1993) (same).

view of the NIGC,[21] and even with that of certain attorneys in the Department of Justice.[22]

Against these authorities, the government advances essentially two related arguments, neither of which is convincing. The government's first and more forceful argument draws on the maxim of statutory construction *expressio unius est exclusio alterius*, which "means inclusion of one thing indicates exclusion of the other."[23] In this context, "the notion is one of negative implication: the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced."[24] The government points to the statement in IGRA that the Johnson Act "shall not apply to any gaming conducted under a Tribal-State compact" that is entered into between "any

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[21] NIGC, *Comments* by NIGC Commissioners Homer and Poust, 67 Fed. Reg. 41,169 (June 17, 2002) ("Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game, and is played with the use of an electronic aid.") (quoting *Mega-Mania*, 231 F.3d at 725); NIGC, *Comments*, 67 Fed. Reg. at 41,170 ("Because Congress intended to permit the use of electronic technology in Class II gaming (even if the device might otherwise fall within the ambit of the Johnson Act), the important factor in a game classification analysis is whether the technology is assisting a player or the play of the game."); *id.* at 41,168 ("The traditional broad construction of the Johnson Act encompasses numerous devices manufactured that the Commission now believes Congress presumed to constitute acceptable technologic aids.").

[22] *See, e.g., Memorandum* from Richard Shiffrin, Deputy Assistant Attorney General, to Seth P. Waxman, Associate Deputy Attorney General (June 13, 1996) (reviewing IGRA's legislative history and concluding that "Congress did not intend for [the Johnson Act] to bar the use of [certain] technologic [gaming] aids on Indian lands when operated in compliance with the Class II provisions of IGRA") (taking a position since disavowed by the Department of Justice) (cited with approval in *Diamond Game*, 230 F.3d at 368).

[23] Eskridge, Frickey, and Garrett, *supra* n. 19, at 824.

[24] *Id.*

Indian Tribe having jurisdiction over the Indian country upon which a *Class III* gaming activity is being conducted" and "a state in which gambling devices are illegal," 25 U.S.C. § 2710(d)(3), (6) (emphasis supplied). Because the quoted language is the only express exception provided for in IGRA to the general applicability of the Johnson Act, contends the government, "[t]he necessary corollary to that express exception . . . is that, where there is no such compact, 'gambling devices' may not be used in Indian country."[25]

We disagree. The persuasive evidence from IGRA's legislative history seriously undermines the government's rather bald *expressio unius* argument. Recall the statement in the key committee report that "[i]t is the Committee's intent that with the passage of this act, no other Federal Statute, such as [the Johnson Act] will preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on . . . Indian lands." Committee Report, 1988 U.S.C.C.A.N. at 3082. Reliance on the *expressio unius* canon is unwarranted in such a situation. Because the canon's purpose is to resolve a question not answered by the statute, the canon is not particularly useful where legislative history clearly evinces congressional intent, especially in this context of construing statutes governing Native American affairs.[26]

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[25] Aplts' Br. at 24. *See also* Am. for Reversal Br. at 30 ("It is difficult to conceive of a situation that would more clearly call for the application of *expressio unius*. This Court must presume that Congress did not intend to exempt Class II gambling from the strictures of the Johnson Act.").

[26] *See NLRB* v. *Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002) (en banc) ("While [expressio unius] may find application in other types of cases, in matters of Indian law expressio unius must often be set aside.") (internal citations and quotations omitted); *Martini* v. *Fed. Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1342- 43 (D.C. Cir. 1999) ("A non-binding rule of statutory interpretation, not a binding rule of law, the *expressio*

Second, argues the government, to adopt the appellees' construction of the two statutes, we must first find an implied partial repeal of the Johnson Act by IGRA, a construction of statutes disfavored unless there is "some affirmative showing of [congressional] intention to repeal."[27] The government argues that our language in *Citizen Band Potawatomi Indian Tribe of Oklahoma* v. *Green*, 995 F.2d 179 (10th Cir. 1993)—that the "IGRA provides for limited waiver of Johnson Act in certain circumstances," *id.* at 181, forecloses the appellees' argument that Class II aids are shielded from Johnson Act liability. Again, we disagree: our task, as we have explained, is to read the Johnson Act and IGRA together giving each Congress's enacted text the greatest continuing effect.

Accordingly, consistent with our holding in *MegaMania*, we hold that *if* a piece of equipment is a technologic aid to an IGRA Class II game, its use, sale, possession or transportation within Indian country is then necessarily not proscribed as a gambling device under the Johnson Act. If a piece of equipment is an IGRA Class II technologic aid, a court need not assess whether, independently of IGRA, that piece of equipment is a "gambling device" proscribed by the Johnson Act. Our holding sharpens the issues in this dispute: we now

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unius maxim is often misused . . . . the *expressio unius* maxim, unsupported by arguments based on the statute's structure or legislative history is simply too thin a reed to support the conclusion that Congress has clearly resolved the issue.") (italics supplied); *cf. TRW, Inc.* v. *Andrews*, 534 U.S. 19, 28, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, *in the absence of evidence of a contrary legislative intent.*") (internal quotation marks omitted).

[27] Aplts' Br. at 28 (quoting *Morton* v. *Mancari*, 417 U.S. 535, 550, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)).

analyze whether the Machine is indeed a Class II technologic aid.

B. Whether the Machine is an IGRA Class II Technologic Aid

The government and supporting amici advance two arguments as to why the Machine is not an IGRA Class II technologic aid: that (1) IGRA's authorization of "technologic aids" does not extend to pull-tabs, and that (2) even if it does, the Machine is not a Class II technologic aid but, rather, an unauthorized Class III electronic facsimile of a slot machine. We take each argument in turn.

1. Does IGRA's authorization of Class II "technologic aids" extend to pull-tabs?

We first detail the NIGC's construction of IGRA in its recently revised regulations of IGRA, which would extend Class II protection to technologic aids to pull-tabs. We then explain why that definition is controlling in this case.

a. *The NIGC Regulations Extending Class II Protection for "Technologic Aids" to Pull-Tabs*

The government's argument that IGRA does not authorize technologic aids for pull-tabs is directly contrary to the NIGC's most recent amendments to the Code of Federal Regulations. On July 17, 2002, the NIGC issued revised regulations stating that "pull tab dispensers and/or readers" are among the games included as IGRA Class II "electronic, computer, or other technologic aids." 25 C.F.R. § 502.7(a), (c). These revised regulations are applicable because rather than being newly promulgated regulations, they are merely amendments, and do not operate retroactively since they do not "attach new legal consequences to events completed before enactment." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

The government has conceded that the Machine is "an electromechanical dispenser and reader of paper pull-tabs." Aplts' Br. at 3. Thus, if we adopt the NIGC's construction of IGRA, we need only decide whether the Machine constitutes an "electronic, computer, or other technologic aid[ ]" to pull-tabs. Unless the government can show why we should not defer to the NIGC's construction of 25 U.S.C. § 2703, appellees prevail on this point. As detailed below, we conclude that the NIGC's construction is entitled to deference.

b. *Chevron Deference*

In *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), the Supreme Court reaffirmed that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principles of deference to administrative interpretations . . . consistently followed . . . whenever decision as to the meaning or reach of a statute [ ] involve[s] reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation [ ] depend[s] upon more than ordinary knowledge respecting the matters subjected to agency regulations.

Underlying this judicial deference to administrative agencies is the notion that the "rule-making process bears some resemblance to the legislative process and serves to temper the resultant rules such that they are likely to withstand vigorous scrutiny."[28]

With regard to classifying devices under IGRA, the NIGC's specialization warrants such deference. As the D.C. Circuit has noted, "Congress created the NIGC, headed by a Chair appointed by the President and confirmed by the

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[28] *Atchison, Topeka and Santa Fe Ry. Co.* v. *Pena*, 44 F.3d 437, 442 (7th Cir. 1994) (en banc).

Senate presumably for his or her expertise on Indian gaming." *Diamond Game*, 230 F.3d at 369. Congress intended that the NIGC would resolve difficult policy questions such as how to further the "objective of allowing Indian tribes to use gaming as a means of 'promoting tribal economic development, self-suficiency, and strong tribal governments,'" *id.* at 368 (quoting 25 U.S.C. §§ 2701-02) (alterations in original), while at the same time" 'shield[ing] [tribes] from organized crime and other corrupting influences,'" *id.*, and from the "risk of corruption or excessive gambling losses." 230 F.3d at 368. Indeed, our circuit has held that we "afford the regulations promulgated by the [NIGC] and published in the Code of Federal Regulations the deference prescribed in *Chevron*." *MegaMania*, 231 F.3d at 718 (citing *Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778).

In reviewing the NIGC's interpretation of IGRA under *Chevron*, we ask two questions:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress [*Chevron* step 1]. But if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. If Congress has explicitly or implicitly delegated authority to an agency, legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute [*Chevron* step 2].

MegaMania, 231 F.3d at 718 (quoting *Maier* v. *EPA*, 114 F.3d 1032, 1040 (10th Cir. 1997) (in turn quoting *Chevron*, 467 U.S. at 842-44, 104 S. Ct. 2778)) (quotation marks and

citations omitted) (bracketed parentheticals supplied). Accordingly, we proceed to apply *Chevron's* two-step analytic framework.

Chevron Step One

To determine "whether Congress has directly spoken to the precise question at issue," *id.*, *i.e.*, whether IGRA authorizes the use of technologic aids to pull-tabs, we employ "traditional tools of statutory construction." *Arco Oil & Gas Co.* v. *EPA*, 14 F.3d 1431, 1436 (10th Cir. 1993) (internal quotation marks omitted). We turn to *Chevron's* second step only if "nothing in the statute directs" a clear answer. *Public Lands Council* v. *Babbitt*, 167 F.3d 1287, 1302 (10th Cir. 1999) (en banc).

We begin with the statutory text. IGRA defines "Class II gaming" as:

> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—
>
> (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
>
> (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
>
> (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo. . . .

25 U.S.C. § 2703(7)(A). Whether the authorization of the use of technologic aids extends to pull-tabs is not clearly resolved by the text of § 2703(7)(A)(i), which leaves ambiguous whether "technologic aids" parenthetical refers only to bingo, or also refers to the other games of chance authorized as Class II gaming in subsection (i)(III). There is no mention in any of the seven merits briefs filed in this appeal of, nor have we discovered, any legislative history pre-dating IGRA that speaks directly to the permissibility of Class II technologic aids for games other than bingo, or, for that matter, to the classification of pull-tab aids or dispensers in general. Moreover, application of traditional canons of statutory construction leaves us in equipoise.

For example, on the one hand, "[t]he doctrine of *ejusdem generis* provides that when there are general words following particular and specific words, the former [are] confined to things of the same kind."[29] Accordingly, the authorization in subsection (7)(A)(I) of the use of aids for bingo could be reasonably read as authorizing the use of technologic aids for all Class II bingo and bingo-like gaming authorized in that subsection.

On the other hand, as several amici anti-gambling organizations counter, the "last antecedent rule" of statutory construction arguably points the other way. *See* Am. for Reversal Br. at 7-9. Under this rule of construction, "[r]eferential and qualifying words or phrases refer only to the last antecedent, unless contrary to the apparent legislative intent."[30]

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[29] *United States* v. *Bedonie*, 913 F.2d 782, 790 n.7 (10th Cir. 1991) (internal quotation marks omitted and italics supplied). *See also Norfolk & Western Ry. Co.* v. *Am. Train Dispatchers Ass'n*, 499 U.S. 117, 129, 111 S. Ct. 1156, 113 L. Ed. 2d 95 (1991) (applying the *ejusdem generis* canon).

[30] Eskridge, Frickey & Garrett, *supra* n.19, at 826. *See also United States* v. *Telluride Co.*, 146 F.3d 1241, 1245 (10th Cir. 1998) ("The last

Because "technologic aids" is a qualifying phrase, goes the argument, this clause therefore modifies only the immediately preceding phrase ("the game of chance commonly known as bingo"), but does not modify "pull-tabs." Accordingly, because "nothing in the statute directs" a clear answer, *Public Lands Council*, 167 F.3d at 1302, we turn to *Chevron's* second step.[31]

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antecedent rule [ ] applies modifying words or phrases to the immediately preceding word or phrase.").

[31] As we have discussed, the NIGC regulations construe the ambiguity in IGRA in favor of the position advocated by the tribes in this case. This construction is consistent with the *Blackfeet* canon, under which "federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit." *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997) (citing *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985)). Both parties in this case extensively briefed the *Chevron* issue, and, perhaps because the agency view points in favor of the tribes' position, no party has argued that the *Blackfeet* canon is implicated. In *Ramah*, 112 F.3d at 1461-62, this court, construing regulations promulgated by the Secretary of the Interior to implement the Indian Self Determination and Education Assistance Act that were *opposed* by the tribes, stated that "for purposes of this case, [ ] the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes." *See also Albuquerque Indian Rights* v. *Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991) (rejecting the proposition that *Chevron* deference trumps the *Blackfeet* canon). Subsequently, in *MegaMania*, this court cited the *Blackfeet* canon with approval, *see* 231 F.3d at 718, but proceeded to resolve the question in favor of the tribes based in part upon *Chevron* deference. *See id.* at 720-25; *cf. Shakopee Mdewakanton Sioux Community* v. *Hope*, 16 F.3d 261, 264 (8th Cir. 1994) ("[T]he Commission has satisfied the requirement that statutes be interpreted in favor of the Indian Tribes.") (internal citations and quotation marks omitted). *But cf. Williams* v. *Babbitt*, 115 F.3d 657, 663 n.5 (9th Cir. 1997) (deferring to the Secretary of Interior's regulations of the Reindeer Industry Act under *Chevron* notwithstanding that the *Blackfeet* canon cut the other way). In any event, the *Blackfeet* canon supports our conclusion, and we need not further address the issue.

Chevron Step Two

This step requires that we determine whether the NIGC's regulation stating that "pull tab dispensers and/or readers" are IGRA Class II "electronic, computer or other technologic aids," 25 C.F.R. § 502.7, is a "permissible construction of the statute," *Maier*, 114 F.3d at 1040 (quoting *Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778), or, instead, is "arbitrary, capricious, or manifestly contrary to the statute." *Id.*

At least six factors support the reasonableness of the NIGC's construction as consistent with IGRA. First, the regulation represents a plausible reading of 25 U.S.C. § 2703(7)(A)(I)'s text. Second, as discussed above, the *ejusdem generis* canon supports such a construction. Third, the NIGC's relatively inclusive reading of § 2703 has some support in IGRA's legislative history.[32] Fourth, the NIGC's construction is not an unreasonable choice in the sense that the NIGC has adopted the reading of an ambiguous statute that is ostensibly more likely to expand the pool of tribal revenue through greater gaming variety and offerings.[33]

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[32] *See* Committee Report, 1988 U.S.C.C.A.N. at 3079 ("The Committee specifically rejects any inference that tribes should restrict [C]lass II games to existing game sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting Class II games and *the language regarding technology is designed to provide maximum flexibility.*") (emphasis supplied).

[33] *See* 25 U.S.C. § 2702 (stating that one of the purposes of IGRA was "to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue"); *see also, e.g.*, Kathryn R.L. Rand, *There Are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 Chap. L. Rev. 47, 53 (2002) (surveying recent studies of tribal economic trends, and noting "marked improvements for many Native American communities, largely due to gaming revenue"). *But cf, e.g.*, Richard J. Ansson, Jr. & Ladine Oravetz, *Tribal Economic Development: What Challenges Lie Ahead for Tribal Nations as They*

Fifth, the NIGC may also wish to interpret ambiguities in IGRA so as to narrow its demanding oversight mandate.[34] Finally, perhaps the best evidence of the reasonableness of the NIGC's construction is the favorable reception it has already received in the federal courts.[35]

For these reasons, we hold that the NIGC's determination in 25 C.F.R. § 502.7 that IGRA authorizes Class II

Continue to Strive for Economic Diversity?, 11 Kan. J.L. & Pub. Pol. 441, 441 (2002) ("[F]or most tribes, these corporate business ventures' profits . . . in the gaming [ ] industry[ ] have been marginal"); Frank R. Wolf, United States Representative, Press Release, *Wolf Measure Would Allow State Legislatures to Have Voice in Creation of Gambling Operation on Indian Reservations* (June 19, 2001), at www.house.gov/wolf/2001619wolfindianleg.htm ("Nearly 80 percent of Native Americans don't receive anything from gambling revenues. . . . Most tribes, living in areas that are not economically viable for a casino, continue to live in awful poverty, plagued by disease, infant mortality, unemployment and a lack of educational opportunities.").

[34] *See, e.g.*, Statement of Harold A. Monteau, Chairman, NIGC, *The Indian Gaming Regulatory Act Amendments Acts of 1995: Hearings on S. 487 Before the Senate Appropriations Subcommittee on Interior and Related Agencies*, 104th Cong., 1st Sess. 248 (1995), 1995 WL 293541 (urging that fulfillment of the NIGC obligations cannot be met within the statutory limitation on appropriations and assessments for the NIGC); Michael D. Cox, *The Indian Gaming Regulatory Act: An Overview*, 7 St. Thomas L. Rev. 769, 770 (1995) (commenting that "[t]he NIGC, charged with monitoring over 210 gaming operations . . . is underfunded and understaffed").

[35] *See, e.g.*, *Diamond Game*, 230 F.3d at 367 ("[T]he Act allows the use of 'electronic, computer, or other technologic aids' in connection with Class II games.") (quoting 25 U.S.C. § 2703(7)(A)(i)); *Cabazon Band of Mission Indians* v. *National Indian Gaming Comm'n*, 827 F. Supp. 26, 31 (D.D.C. 1993) (noting that § 2703(7)(A) authorizes "the use of 'aids' for certain Class II *games* " (emphasis supplied), *aff'd*, 14 F.3d 633 (D.C. Cir. 1994)). *But see Santee Sioux Tribe of Nebraska*, 324 F.3d at 613 (stating in dicta that "we believe that the phrase 'whether or not electronic, computer, or other technologic aids are used in connection therewith' applies only to bingo").

technologic aids for pull-tabs is a "permissible construction of the statute," and we therefore accord it "controlling weight." *MegaMania*, 231 F.3d at 718 (quoting *Chevron*, 467 U.S. at 842-43, 104 S. Ct. 2778).

2. Is the Machine a Class II Technologic Aid?

As noted above, IGRA defines Class II games to include "bingo (whether or not electronic, computer or other technologic aids are *used in connection therewith*) . . . including (if played in the same location) pull-tabs . . . and other games similar to bingo . . . 25 U.S.C. § 2703(7)(A)" (emphasis supplied). The government does not dispute that the game played with the Machine was, or would have been, played in the same location as bingo. Rather, the government's two arguments are that (1) the game played with the Machine is not pull-tabs, but, rather, an electromechanical facsimile version of slots; and (2) that the Machine does not fall within IGRA's definition of an "aid." As detailed below, we reject these arguments and hold the Machine is a Class II technologic aid to the game of pull-tabs.

A. *The Machine is Used "in connection" with pull-tabs*

Contrary to the government's assertion, the game played with the Machine falls within the definition of pull-tabs. IGRA does not define pull-tabs. Nor do the NIGC's regulations.[36] This court, though, has provided a definition. In *Chickasaw Nation* v. *United States*, 208 F.3d 871 (10th Cir. 2000), *aff'd*, 534 U.S. 84, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001), we stated that pull-tabs is a "scheme by which prizes are randomly distributed to the winners among the persons who have paid for a chance to win them, i.e. by purchasing

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[36] *See* Definitions Under the Indian Gaming Act, 57 Fed. Reg. 12,382-83 (April 9, 1992) (providing no definition and stating that the NIGC will rely on the common law definition of pull-tabs).

one or more pull-tab tickets in a series." *Id.* at 877. We noted that in pull-tabs, after players purchase a tab from a clerk or from the given dispensing machine, they must peel back the top layer to determine whether the tab contains a winning combination of symbols, and that if players purchase a winning tab, they must present it to the cashier. *See id.* at 874.

The Machine meets this definition. It dispenses paper pull-tabs from a roll that is part of a larger deal, and the deal contains a predetermined number of randomly distributed winning tabs. Although a pull-tabs player may opt to view the video display regarding the contents of the paper pull-tabs, players of the Machine must still manually peel back the top layer of the pull-tab to confirm victory, and it is that tab presented for visual inspection to a gaming hall clerk that entitles players to winnings. We thus reject the argument that the game played with the Machine is slots: although we acknowledge some superficial similarities between the two, pull-tabs, even when sped up, placed under lights, and depicted with a spinning machine on the side, is still pull-tabs. We hold that the Machine is used in connection with the playing of pull-tabs.

B. *Whether the Machine is an Aid to the Game of Pull-Tabs*

We first detail the NIGC's definition of "aid", and then explain why we accord it controlling weight. Finally, we explain why the Machine meets that definition.

i. *The Definition by the NIGC's Regulations of "Aid"*

IGRA does not define "technologic aids." The NIGC, however, recently issued regulations, which state

> (a) Electronic, computer or other technologic aid means any machine or device that:

(1) Assists a player or the playing of a game;

(2) Is not an electronic or electromechanical facsimile; and

(3) Is operated in accordance with applicable Federal communications law.

(b) Electronic, computer or other technologic aids include, but are not limited to, machines, or devices that:

(1) Broaden the participation levels in a common game;

(2) Facilitate communication between and among gaming sites;

(3) Allow a player to play with or against other players rather than with or against a machine.

(c) Examples of electronic, computer or other technologic aids include pull-tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games.

25 C.F.R. § 502.7.

ii. *The NIGC's Definition in 25 C.F.R. § 502.7 is Controlling*

The government does not dispute that the three requirements identified in 25 C.F.R. § 502.7(a) must be met for a device to qualify as a Class II technologic aid; rather, the government argues that we should impose an additional requirement. According to the government, the Machine is

not a Class II technologic aid because Class II aids must "broaden participation" in the games. *See* Committee Report, 1988 U.S.C.C.A.N. at 3079 (stating that use of an aid that "would merely broaden the participation levels is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players"). The government argues that in *MegaMania*, we endorsed the "broaden participation" requirement, Aplts' Reply Br. at 13, and also points to the Ninth Circuit's statement that "the passage from the Committee report also reinforces the notion that electronic aids are essentially aimed at communications to enable broader participation in a common game."[37]

For several reasons, we are unpersuaded that the "broaden participation" requirement suggested by the government should be grafted onto IGRA. First, we reject the government's characteriza-tion of our holding in *MegaMania*. In *MegaMania*, we held that the device at issue was a technologic aid *in part* because it broadened participation in the underlying game of bingo. *See* 231 F.3d at 724-25 (identifying the broadening of participation as one of at least four reasons supporting the holding). We did not hold that broadening participation was a requirement, nor did we endorse any such categorical rule. Rather, like the subsequently published NIGC regulations, we identified the broadening of participation as a factor favoring a finding that a device is a Class II aid.

Second, we conclude that the NIGC's definition of "aid," which does not include the "broaden participation" requirement, is entitled to full *Chevron* deference. Applying *Chevron's* first step, nothing in either IGRA's text or

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[37] *Sycuan Band of Mission Indians* v. *Roache*, 54 F.3d 535, 543-44 (9th Cir. 1995).

legislative history points towards a *requirement* that a technologic aid broaden participation. Indeed, the Committee Report uses the term "for example" to describe how a device might qualify as a Class II aid by broadening participation in the given game. Committee Report, 1988 U.S.C.C.A.N. at 3079. And the NIGC's regulation closely tracks the legislative history, stating that "[e]lectronic, computer or other technologic aids include, but *are not limited to,* machines or devices." 25 C.F.R. § 502.7(b) (emphasis supplied). Moreover, adopting the government's strict proposed definition of "aid" would run counter to the Committee Report's exhortation that "tribes be given the opportunity to take advantage of modern methods of conducting Class II games and the language regarding technology is designed to provide maximum flexibility." 1988 U.S.C.C.A.N. at 3079. Accordingly, we adopt the standard articulated by the NIGC's regulation, and express no opinion concerning whether the Machine broadens participation in the playing of pull-tabs.

As to *Chevron's* second step, we conclude that the NIGC's regulation is based on a permissible construction of IGRA. As noted, the NIGC's regulations provides a three-part test for determining whether a machine or device is a Class II aid, requiring that the device

(1) Assists a player or the playing of a game;

(2) Is not an electronic or electromechanical facsimile; and

(3) Is operated in accordance with applicable Federal communications law.

25 C.F.R. § 502.7.

In *Diamond Game*, Judge Tatel's unanimous panel opinion concluded that the Lucky Tab II functions as an aid to the game of pull-tabs because the Lucky Tab II is not an electromechanical facsimile, and because the Lucky Tab II literally "helps or supports" or "assists" the playing of pull-tabs.[38] The opinion emphasized that Lucky Tab II physically cuts tabs from paper rolls and dispenses them to players, and merely displays the contents of the paper tab on its video screen for view by players, who must still peel and display any winning tabs to a clerk to obtain a prize. *See* 230 F.3d at 370. Concluding that the Lucky Tab is "little more than a high-tech dealer," and that the pull-tabs game with the Lucky Tab II is in the paper rolls, not the device, *id.*, the D.C. Circuit held that the Lucky Tab II is a Class II technologic aid. *See id.* We are persuaded that the D.C. Circuit's interpretation of "aid" as the term is used in IGRA is correct.

The government would have us distinguish *Diamond Game* on two grounds. First, argues the government, *Diamond Game* is distinguishable because in that case, the NIGC never issued an advisory classification on Lucky Tab II, as it did with the Machine in this case. *See* Aplts' Br. at 38. It is true that an administrative agency's opinion letter is "entitled to respect." *MegaMania*, 231 F.3d at 719 (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944)). However, an agency's opinion letter is not binding, nor, unlike an NIGC regulation enacted pursuant to the rigors of the Administrative Procedure Act, is it entitled to any deference. Instead, the NIGC's opinion letter is at most persuasive authority; it is entitled only to that weight that its power to persuade compels. *See* 231 F.3d at 719. Significantly, the NIGC's opinion letter regarding the

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[38] *Diamond Game*, 230 F.3d at 370 (quoting *Webster's Third New International Dictionary* 44 (1993)).

Machine was predicated on a district court opinion that was subsequently reversed by the D.C. Circuit.[39] The reversal of that opinion in a persuasively reasoned decision by the D.C. Circuit confirms that the NIGC letter lacks much persuasive force here.

Second, argues the government, *Diamond Game* is distinguishable because the D.C. Circuit did not address whether the Lucky Tab II was a Johnson Act "gambling device." Aplts' Br. at 38. However, whether the D.C. Circuit completed the IGRA Johnson Act syllogism is immaterial to our IGRA-classification analysis. Accordingly, we reject the government's attempts to distinguish *Diamond Game*. The NIGC's regulations' straightforward construction of "technologic aid," in essence adopting the D.C. Circuit's standard, is at least a permissible construction of the statute; indeed, were we required to reach the question on a blank slate, we might well adopt that standard. We therefore accord the NIGC's definition of "technologic aid" controlling weight. *See MegaMania*, 231 F.3d at 718.

iii. *The Machine Meets the Controlling NIGC's Definition of Aid*

Because the NIGC's definition controls, the Machine is a Class II aid if it "(1) [a]ssists a player or the playing of a game; (2)[i]s not an electronic or electromechanical facsimile; and (3)[i]s operated in accordance with applicable Federal communications law." 25 C.F.R. § 502.7. With its last gasp, the government contends that the Machine fails the second and third of these requirements.

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[39] *See* Aplts' App. at 9 (Letter from NIGC General Counsel Kevin Washburn dated Feb. 29, 2000) (stating that "Lucky Tab closely parallels [the Machine] and that "the [district] court opinion in [Diamond Game] provides clear guidance to determine the classification for the Magic Irish").

We disagree. Like the Lucky Tab II, the Machine (1) cuts tabs from paper rolls and dispenses them to players, and when its "verify" feature is enabled, displays the contents of the paper pull-tab on the video screen; (2) does not use a computer to select the patterns of the pull-tabs it dispenses; and (3) requires players to peel each pull-tab to confirm the result and provide the pull-tab to a clerk for inspection prior to receiving any prize. As with the Lucky Tab II, with the Machine, the Machine is not the game of pull-tabs; rather, the Machine facilitates the playing of pull-tabs, "the game is in the paper rolls." *Diamond Game*, 230 F.3d at 369-70. As such, the Machine is not a "computerized version" of pull-tabs. *See id.*; *see also Santee Sioux Tribe of Neb.*, 324 F.3d at 614-15 (in holding that the Lucky Tab device at issue was not a computerized version of pull-tabs, emphasizing "the fundamental fact that the player receives a traditional paper pull-tab from a machine, and whether he or she decides to pull the tab or not, must present that card to the cashier to redeem winnings."). Nor, put in terms of the NIGC's regulations implementing IGRA, is the Machine an "electronic or electromechanical facsimile." 25 C.F.R. § 502.7. Thus, contrary to the government's suggestion, the Machine does not "change[ ] the fundamental characteristics" of pull-tabs as played by the user. Aplts' Br. at 33 (citing Committee Report, 1988 U.S.C.C.A.N. at 3079).

Accordingly, we follow the reasoning of the D.C. Circuit, and, applying the NIGC's definition, hold that the Machine is a Class II technologic aid. Under our holding in Part IV(A), the appellees' use of the Machine in Indian country is therefore insulated from liability based on the Johnson Act's ban on gambling devices.

CONCLUSION

For the reasons detailed above, we AFFIRM the district court's declaratory judgment that the Machine is (1) not an illegal "gambling device" under the Johnson Act and (2) a permissible technologic aid to Class II gaming under IGRA.[40]

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[40] In addition, appellees' motions to dismiss the appeal as moot and to file supplemental briefing are denied.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Case No. 00-CF-609-BU(M)

SENECA-CAYUGA TRIBE OF
OKLAHOMA, ET AL., PLAINTIFFS

v.

NATIONAL INDIAN GAMING COMMISSION, ET AL.

[Filed: Feb. 20, 2001]

JUDGMENT

This action came on for trial before the Court sitting without a jury and the issues having been duly tried and oral findings of fact and conclusions of law having being made on the record pursuant to Fed. R. Civ. P. 52(a),

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of Plaintiffs and against Defendants declaring that the Magical Irish device is a permissible Class II aid under the Indian Gaming Regulatory Act, 25 U.S.C. § 2710, *et seq.* and that it is not a gaming device under the Johnson Act, 15 U.S.C. § 1171, *et seq.*

Dated at Tulsa, Oklahoma, this 20 day of February, 2001.

/s/ MICHAEL BURRAGE
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE TENTH CIRCUIT

No. 01-5066

SENECA-CAYUGA TRIBE OF OKLAHOMA, FORT SILL APACHE TRIBE OF OKLAHOMA; NORTHERN ARAPAHO TRIBE OF WYOMING; DIAMOND GAME ENTERPRISES, PLAINTIFFS-APPELLEES

v.

NATIONAL INDIAN GAMING COMMISSION, ATTORNEY GENERAL OF UNITED STATES, JOHN ASHCROFT; DEPARTMENT OF JUSTICE; UNITED STATES ATTORNEY, SUED AS: UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF OKLAHOMA, DEFENDANTS-APPELLANTS

NATIONAL COALITION AGAINST GAMBLING EXPANSION, STAND UP FOR KANSAS, AND NEW MEXICO COALITION AGAINST GAMBLING, AMICI-CURIAE

[Filed: June 24, 2003]

ORDER

Before: HENRY, MCWILLIAMS and LUCERO, Circuit Judges

Appellants' petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. 35. No member of the

panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing en banc is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

/s/ PATRICK FISHER
PATRICK FISHER
Deputy Clerk

APPENDIX D

1. Section 1171(a) of Title 15 provides:

As used in this chapter—

(a) The term "gambling device" means—

(1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.

* * * * *

2. Section 1172(a) of Title 15 provides:

It shall be unlawful knowingly to transport any gambling device to any place in a State or a possession of the United States from any place outside of such State or possession:

Provided, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section, nor shall this section apply to any gambling device used or designed for use at and transported to licensed gambling establishments where betting is legal under applicable State laws: *Provided, further*, That it shall not be unlawful to transport in interstate or foreign commerce any gambling device into any State in which the transported gambling device is specifically enumerated as lawful in a statute of that State.

3. Section 1175(a) of Title 15 provides:

It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18, including on a vessel documented under chapter 121 of title 46 or documented under the laws of a foreign county.

4. Section 1178 of Title 15 provides:

None of the provisions of this chapter shall be construed to apply—

(1) to any machine or mechanical device designed and manufactured primarily for use at a racetrack in connection with parimutuel betting,

(2) to any machine or mechanical device, such as a coin-operated bowling alley, shuffleboard, marble machine (a so-called pinball machine), or mechanical gun, which is not designed and manufactured primarily for

use in connection with gambling, and (A) which when operated does not deliver, as a result of the application of an element of chance, any money or property, or (B) by the operation of which a person may not become entitled to receive, as the result of the application of an element of chance, any money or property, or

(3) to any so-called claw, crane, or digger machine and similar devices which are not operated by coin, are actuated by a crank, and are designed and manufactured primarily for use at carnivals or county or State fairs.

5. Section 2703 of Title 25 provides, in pertinent part:

For purposes of this chapter—

* * * * *

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term "class II gaming" means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

* * * * *

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

6. Section 2710 of Title 25 provides, is pertinent part:

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

* * * * *

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

* * * * *

Supreme Court, U.S.
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No. 03-740

In The Supreme Court of the United States

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.,

Petitioners,

v.

SENECA-CAYUGA TRIBE OF OKLAHOMA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this case is moot because Respondent Indian tribes no longer use the Magical Irish pull-tab dispenser/display system and Respondent Diamond Game Enterprises, Inc. no longer distributes the system?

Whether the court of appeals, having concluded that the Magical Irish pull-tab dispenser/display is a class II "technological aid" under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, was therefore correct in holding that it may be used at an Indian gaming facility in Indian country subject only to the regulatory regime for class II Indian gaming?

STATEMENT PURSUANT TO RULE 29.6

Diamond Game Enterprises, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 327 F.3d 1019. The opinion of the district court is unreported.

COUNTERSTATEMENT OF THE CASE

A. Introduction.

Three federal courts of appeals have now considered whether Indian tribes, in exercising their sovereign rights federally recognized in the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"), to conduct the class II game known as "pull-tabs," may lawfully employ a mechanical pull-tab reader/dispenser like the one at issue in this case. The judgment of these three courts has been unanimous. Without a single dissenting voice, they have concluded that tribes may lawfully employ such pull-tab reader/dispensers in their gaming operations.

In the face of these uniform results, Petitioners seek review in this Court because one of the three federal courts (the 8th Circuit), in the course of reaching the same conclusion as the other two (the D.C. and 10th Circuits), adopted a modestly different methodology. This non-determinative difference in approach does not warrant this Court's intervention.

As a threshold matter, this case presents a poor (indeed probably impossible) vehicle for considering the Petitioners' appeal, even if the case were otherwise worthy of review (which it is not). The declaratory judgment action originally filed by Respondents is moot. As reflected in uncontested sworn declarations that accompanied Respondents' motion to dismiss the case as moot and vacate the district court judgment in their favor, Respondent tribes no longer use the Magical Irish Instant Bingo Dispenser System ("Magical Irish") at issue here and have no intention of using Magical Irish in the

future. Respondent Diamond Game Enterprises no longer manufactures or distributes Magical Irish and it, too, has no intention of doing so in the future. In concluding on these facts that a live case or controversy still exists, the 10th Circuit clearly misapplied this Court's mootness jurisprudence. Accordingly, for this Court even to reach the questions presented in the petition, it will necessarily first have to traverse a thorny jurisprudential thicket just to satisfy itself (as is highly doubtful) that it has jurisdiction to hear the case.

In any event, Petitioners' case for certiorari rests on two separate alleged circuit splits, one of which is illusory and both of which are of doubtful significance. Petitioners cannot prevail in this case unless it can show: first, that the 10th Circuit erred in ruling that the scope of the Johnson Act, 15 U.S.C. § 1171 *et seq.*, as it operates in Indian country, should be read in consonance with (rather than independently from) IGRA's authorization of technological aids for use in class II gaming; and, second, that, even if the Johnson Act applies independently, Magical Irish is a prohibited "gambling device" under that Act.

The Department of Justice's position on both points has met with near complete disfavor and, remarkably, is at odds with the position of the National Indian Gaming Commission ("NIGC"), the agency responsible for overseeing IGRA, and with the position advanced by the Department of Justice's own Office of Legal Counsel. There is good reason for the loneliness of Petitioners' position. As the 9th, 10th, and D.C. Circuits have all concluded, the Petitioners' approach to the relationship between the Johnson Act and IGRA's provisions governing class II gaming defies the relevant legislative history and the well-established canon of statutory construction that seeks to maximize the continuing effect of potentially conflicting federal laws.

With respect to the definition of "gambling devices" under the Johnson Act, moreover, Petitioners' argument that Magical Irish and the "Lucky Tab" reader/dispenser at issue in the 8th Circuit case are prohibited gambling devices depends on an inaccurate and unsupported description of the reader/dispensers, has no grounding in case law, defies the statutory text, and flies in the face of the 8th Circuit's analysis as well as that of the district court in this case. In addition, Petitioners' claim of a Johnson Act circuit split rests on its interpretation of an isolated 28 year-old per curiam Ninth Circuit decision involving both scant analysis of the Johnson Act and a device that is readily distinguishable in this intrinsically factbound area of law.

But even supposing, despite the uniform contrary authority, that the Johnson Act is best read as proscribing the transportation of pull-tab reader/dispensers into Indian country, this case still does not merit this Court's attention. As the 10th Circuit was careful to emphasize, its ruling leaves the scope of the Johnson Act completely unchanged outside Indian country. It is also uncontested that IGRA authorizes tribes to play the gambling game known as pull-tabs, regardless of the Johnson Act. Thus, this instant dispute boils down to nothing more than whether, in lawfully playing the game of paper pull tabs, the tribes are limited to selling the tabs "over-the-counter" through gambling hall clerks as opposed to out of a particular type of dispenser unit. This argument poses no threat to Petitioners' ability to stop unlawful gaming activity and is simply not the stuff from which Supreme Court review is made.

B. The Statutory Framework

1. IGRA

In the 1980s, as Indian tribes began to administer more and more governmental programs, they began to exercise their inherent sovereign right to develop their economies by conducting gaming activities on their lands. Tribal gaming activity triggered a variety of conflicts between the interests of three sets of sovereigns – the tribes, the states, and the federal government. Enacted in 1988, IGRA was Congress's response to these conflicts and the statute both promotes and regulates Indian gaming as a means to advance tribal development, self-sufficiency and strong tribal governments. 25 U.S.C. §§ 2701-2719.

Under IGRA, Congress recognized the right of tribes exclusively to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited on Indian lands by federal law and is conducted within a State that does not, as a matter of criminal law and public policy, prohibit such gaming activity. *Id.* § 2701. To this end, IGRA divides Indian gaming into three classes, each subject to a different level of regulation.

Class I games consist of traditional forms of Indian gaming and social games played solely for prizes of minimal value. 25 U.S.C. § 2703(6). Tribes maintain exclusive jurisdiction over class I gaming. *Id.* § 2710(a)(1).

IGRA defines class II gaming, in pertinent part, as follows:

> the game of chance commonly known as bingo (*whether or not electronic, computer, or other technologic aids are used in connection therewith*) . . . including (if played in the same location) *pull-tabs*, lotto, punch boards, and tip jars, instant bingo, and other games similar to bingo.

Id. § 2703(7)(A) (emphasis added). IGRA authorizes such class II gaming on Indian land if: 1) the state in which the gaming is located permits such gaming for any purpose by any person; 2) "such gaming is not otherwise specifically prohibited on Indian lands by Federal law;" and 3) the tribe adopts an ordinance approved by the Chairman of the Commission. *Id.* Thus, IGRA explicitly reserves this category of named games for tribal play with tribes as the primary regulatory authority and, further, explicitly authorizes tribes to use "electronic, computer, or other technological aids" in conjunction with playing these games. By contrast, in the absence of a criminal prohibition, states play no role in regulating class II gaming.

Although IGRA itself does not explicitly discuss the relationship between technological aids used to play class II games and the Johnson Act, the Senate Report accompanying the passage of IGRA reveals Congress's view that the Johnson Act should not be read to preclude the use of technological aids in the play of class II games. "It is the Committee's intent," the Senate Report states, "*that with the passage of this act, no other Federal statute, such as [the Johnson Act] will preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands.*" *Indian Affairs Committee Report*, S. Rep. No. 100-446 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082 ("Senate Report") (emphasis added).

In discussing what technological aids tribes might employ in conducting class II gaming, the Senate Report further emphasized that Congress intended:

> that Tribes have maximum flexibility to utilizes games such as bingo and lotto for tribal economic development. . . . The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games

> and the language regarding technology is designed to provide maximum flexibility.

Id. at 3079. This flexible approach was meant to advance IGRA's central goal of encouraging "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

Importantly, IGRA does draw a line between technological aids to class II games and electronic games that in fact constitute class III games, which can only be played pursuant to a negotiated tribal-state compact. 25 U.S.C. § 2710(d)(1). In particular, IGRA excludes from use as a class II game "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B). In this way, IGRA distinguishes between authorized games and those prohibited by the Johnson Act with language specifically defining slot machine-like devices as class III games. IGRA further defines class III games as consisting of all forms of gaming that are not class I or class II. 25 U.S.C. § 2703(8). Through the compacting requirement for class III gaming, IGRA also recognizes a significant role for states in regulating this type of gaming.

2. The Johnson Act

Pre-dating IGRA by more than 30 years, the Johnson Act prohibits the manufacture, sale, transportation, possession, and use of any "gambling device" on federal lands or in Indian country. 15 U.S.C. § 1175. The Johnson Act, which was designed to curb the proliferation of slot machines and similar devices, originally defined a "gambling device" to include slot machines and other coin operated devices. In 1962, Congress amended the statute to slightly expand this definition. A Johnson Act "gambling device" is now defined as:

> any . . . machine or mechanical device . . . designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, *as the result of the application of an element of chance*, any money or property, or (B) by the operation of which a person may become entitled to receive, *as the result of the application of an element of chance*, any money or property. . . .

15 U.S.C. § 1171(a)(2) (emphasis added).

C. The Magical Irish Dispenser/Display

Contrary to the Petitioners' claim, Magical Irish is not a slot machine and bears no meaningful resemblance to a slot machine. Rather, Magical Irish is a dispensing mechanism for the game of paper pull-tabs (an enumerated class II game) that, when activated, will visually display the paper pull-tab result. (App. 38a.)

In the game of pull-tabs, players compete against one another to obtain winning paper cards from a set of cards containing a pre-determined number of winners arranged in a random but pre-determined order. Each complete set of cards is known as a "deal," and may contain more than 100,000 individual cards. An individual card (or pull-tab) is a small paper wafer. When the top layer of the card is removed, the bottom layer reveals a pattern of symbols indicating whether the player has won a prize. In order to redeem the prize, a player must present a paper tab showing a winning set of symbols to a gaming hall clerk. When the game of pull-tabs is played, the very large pre-arranged deal is divided into smaller rolls (or boxes), each of which can be played separately. (App. 8a.)

To participate in the game of pull-tabs, a player must purchase an individual tab from a clerk or a dispenser. The clerk or dispenser takes the next tab in the preprinted roll and delivers it to the player. The player must then open the tab to see if it contains a winning combination and redeem any winning tabs with a gaming hall clerk.

Each Magical Irish system delivers paper pull-tabs from a single roll of 7,500 tabs. Other rolls from the same pull-tab deal may be dispensed either through other Magical Irish units or "over-the-counter" from bingo hall clerks. (App. 8a.) In this way, players who purchase pull-tabs from one Magical Irish device compete for winning tickets against other players who purchase pull-tabs from other devices or, face-to-face, from bingo hall clerks.

When a player inserts money into a Magical Irish device and presses the button marked "DISPENSE," the unit cuts a paper pull-tab from the preprinted roll and drops it into a tray. (App. 8a, 38a.) If the "verify" feature is enabled, a scanner inside the device reads a bar code printed on the back of the paper tab as the tab is dispensed. The device then displays the contents of the pull-tab on a video screen approximately seven seconds after the paper tab has been dispensed. The player can enable or disable the "verify" feature by pressing a button. On either side of the button marked "VERIFY," the following message appears: "Video images may vary from actual images on pull-tabs. Each tab must be opened to verify." In other words, regardless of whether a player is using the "verify" feature, that player can redeem winning pull-tabs only by presenting the *paper tab* to a gaming hall clerk, who in turn must confirm that the paper tab contains a

winning combination of symbols. (App. 8a, 38a.)[1] Magical Irish does not pay the player for a winning ticket, nor does it convert a winning ticket into credit for additional play.

Furthermore, Magical Irish does not select the winners of the pull-tab game. Rather, the winning pull-tabs are prearranged in the randomly located preprinted rolls that make up the pull-tab deal. Magical Irish simply dispenses the next tab in the roll being played. (App. 8a.) Thus, in contrast to a slot machine or variations on a slot machine, Magical Irish does not contain a random number generator, does not affect the outcome of the paper pull-tab game, and is not itself a game of chance. (App. 38a, 42a.) The game, including the entitlement to money, is always in the paper pull-tabs, and (as three courts of appeals have separately concluded) Magical Irish is nothing more than an entertaining way to dispense those paper tabs into the hands of consumers who would like to play the paper game coupled with a visual aid for identifying winning paper tabs.[2]

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[1] The Petitioners are simply wrong when it asserts that a barcode on each tab determines the winners and losers. On the contrary, the symbols on the paper tab always govern and the play of the game, regardless of whether the display function is activated, remains at all times in the paper.

[2] The "Lucky Tab" dispenser/display at issue in *United States v. Santee Sioux, Tribe of Nebraska*, 324 F.3d 607 (8th Cir. 2003), and *Diamond Game Enterprises, Inc. v. Reno*, 230 F.3d 365 (D.C. Cir. 2000) differs from Magical Irish in two respects. First, the optional "verify" feature of Magical Irish works automatically on Lucky Tab. Second, Magical Irish consists of three separate component parts, the dispenser, the verifier, and a base. Lucky Tab integrates these components into a single unit.

1. Procedural History and Decisions Below.

a. The District Court's Decision

On July 25, 2000, Respondents[3] filed a complaint in district court against the NIGC and the other federal government defendants, seeking a judicial declaration that Magical Irish is a class II aid under IGRA and is not prohibited by the Johnson Act. Respondents' complaint was prompted by an NIGC opinion that Magical Irish was a class III game under IGRA and, therefore could not be played without a tribal-state compact. This NIGC opinion, which raised the threat of criminal prosecution against Respondents, was based on a district court opinion regarding the Lucky Tab dispenser/display that was later reversed by the D.C. Circuit. *See Diamond Game Enters., Inc. v. Reno*, 9 F. Supp. 2d 13 (D.D.C. 1998), *rev'd*, 230 F.3d 365 (D.C. Cir. 2000).

On August 30, 2000, the district court held an evidentiary hearing on Respondents' motion for a preliminary injunction. Ruling from the bench, the district court held that Magical Irish is a class II technological aid under IGRA, not a class III gaming device, and that Magical Irish is also not a Johnson Act gambling device. The court reasoned that Magical Irish simply acts as a dispenser of paper pull-tabs, because it takes a preprinted roll of paper pull-tabs and dispenses them in a pre-determined order, just as a clerk does at a pull-tab ticket window. The court

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[3] Respondents include three federally recognized Indian Tribes, the Seneca-Cayuga Tribe of Oklahoma, the Fort Sill Apache Tribe of Oklahoma, and the Northern Arapaho Tribe of Wyoming, each of which operates a class II gaming facility, as well as Diamond Game Enterprises, Inc., the manufacturer of Magical Irish.

emphasized that Magical Irish does not determine what is printed on the tickets, does not select the order of dispensing the tickets, and does not contain a random number generator or any other mechanism for choosing a winner. In the court's words, "It wouldn't change the outcome of the game, whether [the pull-tabs tickets] were sold over-the-counter or put out by the dispenser." The court further noted that Magical Irish does not accumulate winnings or make change of any kind. (App. 11a-12a.)

On February 20, 2001, reaffirmed its conclusions from the preliminary injunction hearing both that Magical Irish is a class II aid under IGRA and that it is not a Johnson Act gambling device. With respect to the Johnson Act issue specifically, the court reasoned that Magical Irish did not qualify as a Johnson Act gambling device because it does not meet the statutory requirement that the machine in question involve an "application of the element of chance." As the court concluded, "[w]hile the game of pull-tabs itself, by its nature, contains an element of chance, no additional element of chance is applied by the [Magical Irish device]." (App. 12a.)

b. The NIGC Amended Regulations and Accompanying Comments

IGRA gives the NIGC authority to "promulgate such regulations and guidelines as it deems appropriate to implement [IGRA's] provisions." 25 U.S.C. § 2706(b)(10). On June 17, 2002, the NIGC (a party to this case) issued new regulations defining permissible class II aids under IGRA. These new regulations explicitly recognized "pull tab dispensers and/or readers" – such as Magical Irish – to be permissible class II aids. 25 C.F.R. § 502.7. In so doing, the NIGC flatly rejected the most recent Department of Justice view, repeated by Petitioners, that Magical Irish (and such dispenser/readers) should not be designated

class II aids because they resemble slot machines (which are a class III game).

Moreover, in its comments accompanying the new regulations, the NIGC set forth its unequivocal view that class II aids under IGRA are not subject to the prohibitions of the Johnson Act. As the NIGC reasoned, the plain language of IGRA expressly permits the use of electronics and technology in aid of class II gaming on Indian lands, yet application of the Johnson Act, if broadly construed, would prohibit the use of the same aids on Indian lands. 67 Fed. Reg. at 41167. The NIGC also noted that the legislative history behind IGRA indicates that Congress did not intend the Johnson Act to apply to at least one category of class II aids: bingo blowers and other devices used in connection with bingo or lotto. 67 Fed. Reg. at 41169 (citing S. Rep. No.100-446, at 12 (1988). The NIGC further reasoned that there is no textual support for the proposition that IGRA still requires a tribal-state compact for operation of a class II aid if the aid meets the definition of a Johnson Act gambling device, and that there is no indication Congress intended for the compacting process to apply in any way to class II gaming. 67 Fed. Reg. at 41170 (citing S. Rep. No. 100-446, at 1 (1988)).

In addition, the NIGC considered the competing purposes behind the Johnson Act and IGRA in concluding that the Johnson Act does not apply to class II aids under IGRA. The NIGC noted that the Johnson Act is a criminal statute intended to restrict the possession, use, and transportation of gambling devices, so the courts have interpreted the Johnson Act broadly to "anticipate the ingeniousness of gambling machine designers." 67 Fed. Reg. at 41167 (quoting *Lion Manufacturing Corp. v. Kennedy*, 330 F.2d 833, 836-837 (D.C. Cir. 1964)). In contrast, IGRA was intended to give tribes "the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is

designed to provide maximum flexibility." 67 Fed. Reg. at 41168 (quoting S. Rep. No. 100-446, at 9 (1988)). Thus, the NIGC concluded, "the ingenuity of gaming designers, which was designed to be constrained by the Johnson Act, is arguably intended to be given freer rein by IGRA in the context of class II gaming." 67 Fed. Reg. at 41168.

c. The Court of Appeals' Decision

On April 17, 2003, the 10th Circuit affirmed the district court. The Court denied Respondents' motion to dismiss on mootness grounds, even though the tribes had long since stopped using Magical Irish, Diamond Game no longer distributed Magical Irish to any tribes, and neither party has any intention of using or distributing Magical Irish in the future. (App. 14a-17a.)

On the merits, the 10th Circuit ruled that users of class II technological aids under IGRA may not be subjected to separate liability under the Johnson Act. Contrary to the Petitioners' contention, in reaching this conclusion, the Court did not rule that IGRA impliedly repealed or created an implied exception to the Johnson Act. Instead, the Court applied the sound and familiar canon of construction that two co-existing statutes should be reconciled so as to "'give each enacting Congress's legislation the maximum continuing effect.'" (App. 21a-22a.) Applying this canon, the Court recognized that, in IGRA, Congress had expressly authorized technological aids for use in conjunction with class II games. In light of that carefully crafted scheme, the Court declined to eviscerate this provision of IGRA (as Petitioners would) by subjecting those aids to Johnson Act liability. At the same time, the Court gave the Johnson Act maximum continuing effect by limiting its holding to IGRA authorized gaming within Indian Country. (App. 22a-28a.)

As the 10th Circuit emphasized, its approach to the interplay of IGRA and the Johnson Act also reflected Congress's clearly expressed intent when enacting IGRA. The key committee report specifically indicates Congress's intent that the Johnson Act *not* "preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands." Furthermore, the Court noted that its approach accorded with that of other courts of appeal, with the most recent views expressed by the NIGC, and even the previous authoritative view emanating from the Office of Legal Counsel within the Department of Justice.[4] (App. 23a-26a.)

Having reached the modest conclusion that the Johnson Act should not be read to prohibit IGRA class II technological aids in Indian country, the Court then concluded that Magical Irish fits IGRA's definition of a class II technological aid. In so holding, the Court rejected Petitioners' comparison of Magical Irish to a slot machine, finding the resemblance only "superficial." It also rejected Petitioners' argument that Magical Irish was an electronic version of the game of pull-tabs. Instead, the 10th Circuit, following the lead of the D.C. Circuit in *Diamond Game*, found that Magical Irish merely "facilitates" the play of paper pull-tabs, a specifically authorized class II game. (App. 37a-44a.)

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[4] As the Office of Legal Counsel concluded, the Senate Report indicates Congress's intention both that class II technological aids not be subject to Johnson Act liability and that this category of "technological aids" be broadly construed. (App. 26a n.22.)

REASONS FOR DENYING THE WRIT

I. THIS CASE HAS A SERIOUS MOOTNESS PROBLEM AND, THEREFORE, PRESENTS A POOR VEHICLE FOR SUPREME COURT REVIEW.

Even if the questions presented here were worthy of review, this case would be an inappropriate vehicle for resolving them because changed factual circumstances have rendered the parties' dispute moot. At the time they initiated their declaratory judgment action, the Respondent Tribes were using (or had contracts to use) Magical Irish in their gaming activities and Respondent Diamond Game was providing Magical Irish to Native-American tribes. However, in sworn affidavits (which were uncontroverted) submitted to the Tenth Circuit in support of a motion to dismiss the case as moot and to vacate the district court judgment in their favor, Respondents attested to the following changed factual circumstances: (a) none of the Tribes presently uses Magical Irish in their gaming activities; (b) Diamond Game no longer provides Magical Irish to any tribe; (c) Respondents have no intention of resuming Magical Irish activities; and (d) Respondents are focusing their present and future gaming activities on other IGRA class II pull-tab games. Respondents argued (App. 14a) that, in light of these changed factual circumstances, they no longer have a legally cognizable interest in whether Magical Irish is an IGRA class II game or a lawful device under the Johnson Act, and therefore the case is now moot. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (case is moot when plaintiff no longer has "a legally cognizable interest in the outcome") (internal quotations omitted).

The Tenth Circuit denied the motion. On its face, however, the Tenth Circuit's analysis departed from this Court's established mootness principles.

For one, the Tenth Circuit applied the incorrect mootness standard. It ruled that dismissal for mootness was unjustified because it remains "technically possible" for Respondents to resume Magical Irish activities, and thus "it is not 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" (App. 15a) (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000)). But whether allegedly wrongful behavior could reasonably be expected to recur is the stringent mootness standard that is applied when the **defendant** says that it has voluntarily ceased the conduct gave rise to the litigation. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) ("the standard . . . for determining [whether] a case has been mooted by the defendant's voluntary conduct . . . is whether subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."). This "heavy burden," *Adarand*, 528 U.S. at 222, is imposed by mootness doctrine to "protect[ ] plaintiffs from defendants who seek to evade sanction by predictable protestations of repentance and reform." *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) (internal quotations omitted).

The standard the Tenth Circuit applied has no bearing on the mootness equation, however, when, as is the case here, it is the **plaintiffs** who have halted the conduct that gave rise to litigation. *See id.* Therefore, Respondents were not required to satisfy the '"heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again,'" (App. 15a, quoting *Adarand*, 528 U.S. at 222), and the "technical possibility" (App. 15a) that Respondents could resume Magical Irish activities is of no consequence in light of the unrefuted affidavits that Respondents are not engaged in Magical Irish activities and have no future intention of doing so.

Second, relying on *City of Erie*, the Tenth Circuit said that it denied the mootness motion because of its perception that Respondents were engaged in "strategic manipulation . . . to seal a favorable decision from review." (App. 16a.) The Tenth Circuit's reliance on *City of Erie* was mistaken. In *City of Erie*, this Court declined to dismiss the defendant's petition for certiorari to the Pennsylvania Supreme Court as moot, citing concerns that the plaintiff was using its asserted voluntary cessation of the disputed conduct to manipulate jurisdiction and insulate from review the state court judgment in its favor. Those concerns were real in *City of Erie* because the Court's practice in disposing of state cases that become moot pending review is to dismiss the petition for certiorari, but to leave the state court judgment in tact. 529 U.S. at 288-89; *id.* at 305 (Scalia, J., concurring). Thus, in *City of Erie*, dismissal on mootness grounds would not have led to the vacatur of the state court victory for the plaintiff.

The concerns that drove the Court's decision to decline to dismiss for mootness in *City of Erie* are absent here. When a federal case becomes moot on appeal as a result of voluntary action taken by the prevailing party below, the general practice is to dismiss the case as moot and vacate the lower court judgment that was favorable to the prevailing party. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 72 (1997); *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23 (1994). Under that practice, dismissal of this case on mootness grounds would not have insulated from judicial review the favorable ruling that the Respondents obtained in the district court – it would have stripped them of that win.

Finally, the Tenth Circuit said that the cessation of Magical Irish activities did not render the case moot because Respondents still could be prosecuted under the Johnson Act for their prior Magical Irish activities, and therefore they retain a legally cognizable interest in the

outcome of the litigation. (App. 14-15a.) But until its threat to prosecute for past use of Magical Irish (which was uttered for the first time in response to the mootness motion), the Department of Justice had only threatened to prosecute if Respondents did not stop their Magical Irish activities. (App. 1-2a, 10a.) In short, what prompted Respondents to bring their declaratory judgment action was a threat of Johnson Act prosecution if they continued to use Magical Irish going forward, not a threat of prosecution for their past use of Magical Irish.

II. CLASS II TECHNOLOGICAL AIDS UNDER IGRA ARE NOT SUBJECT TO SEPARATE LIABILITY AS JOHNSON ACT GAMBLING DEVICES AND THE PURPORTED CIRCUIT SPLIT ON THIS ISSUE IS INSUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S REVIEW

Four Courts of Appeals have now addressed the interrelationship of the Johnson Act and the use of class II technological aids under IGRA. Three of those courts (the 9th, 10th, and D.C. Circuits) agree that Congress did not intend for class II technological aids to be subject to Johnson Act liability. Although the 8th Circuit disagrees on this point (holding that the Johnson Act theoretically may apply to class II gaming under IGRA), the divergence is completely academic because that Court concluded that pull-tab dispenser/displays, like Magical Irish, are not Johnson Act gambling devices.[5] Given the uniform result

[5] In a particularly strained passage, Petitioners suggest that the D.C. Circuit actually agrees with the 8th Circuit's approach to the Johnson Act, citing to a line in *Cabazon Band of Mission Indians v. NIGC*, 14 F.3d 633, 635 n.3 (D.C. Cir.), *cert. denied*, 512 U.S. 1221 (1994), regarding the extent to which IGRA repealed the Johnson Act.

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reached by all four courts of appeal, and the inconsequential nature of the 8th Circuit's minor doctrinal variation, this Court should deny the petition for certiorari.

A. The Tenth Circuit Decision Properly Reconciled IGRA and the Johnson Act

Reserving for the moment, the "how many angels dance on the head of a pin" quality of the purported split among the circuits, as is apparent from the thorough analysis in both the 10th Circuit opinion here and the 9th Circuit opinion in *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000), there is no reason to revisit the majority view. These opinions are deeply grounded in both statutory language and legislative history and apply two well-established canons of statutory construction. First, "When there are two acts upon the same subject, the rule is to give effect to both if possible." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)); *see*

Cert. Pet. at 18. Petitioners have the D.C. Circuit's approach quite wrong. In *Diamond Game*, the D.C. Circuit explicitly stated, citing to the very passage from *Cabazon* that the Petitioners quote selectively, that the Circuit already had "interpreted IGRA as limiting the Johnson Act prohibition to devices that are neither Class II games approved by the Commission nor Class III games covered by tribal-state compacts." *Diamond Game*, 230 F.3d 365, 367, (2000). Indeed, in its parenthetical describing the passage in question from *Cabazon*, the panel in *Diamond Game* described it as "implying that Class II aids, permitted under IGRA, do not run afoul of the Johnson Act." *Id.* It is true, as the Petitioners claim, that the D.C. Circuit rejected the concept of an implied repeal of the Johnson Act with respect to class II technological aids. But the 9th and 10th Circuits do not speak in terms of implied repeal either. They talk about maximizing the effect of two co-existing statutes by recognizing that class II technological aids should not be deemed prohibited by the Johnson Act. On this key point, the D.C., 9th, and 10th Circuits are clearly in accord.

also FCC v. NextWave Personal Communications, Inc., 537 U.S. 293, 304 (2003). And, second, a specific statute governs over a more a general one. *Morton*, 417 U.S. at 551; *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (specific preemption provision governs over general saving clause); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (specific provision on expert witness fees controls over general costs provision), *superseded on other grounds by* the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

In this case, interpreting the Johnson Act to generally prohibit the use of gambling devices in federal territories, while construing IGRA to authorize class II gaming using technological aids in Indian country, gives maximum effect to both statutes. Allowing class II gaming on Indian lands would not unduly interfere with the operation of the Johnson Act. To the contrary, giving full effect to the class II gaming provisions of IGRA would have only a minimal effect on the Johnson Act, which would still prohibit class III gaming on Indian lands in the absence of a tribal-state compact, and the use of all gambling devices in other federal territories. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 156 (1972) (specific venue provision of the National Bank Act controls over general venue provision of the Securities Exchange Act, in part because giving effect to the National Bank Act provision would not unduly interfere with the operation of the Securities Exchange Act, and would have no impact on the vast majority of lawsuits brought under the Securities Exchange Act). Moreover, to the extent there is any conflict in the application of the Johnson Act and IGRA to class II gaming, IGRA must control as the specific, later-enacted statute. As with the Indian preference statute in *Morton*, IGRA is "a specific provision applied to a very specific situation," and "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one. . . . " *Morton*, 417 U.S. at 550-51.

Respondents will not repeat here all the substantial evidence that Congressional intent is best served by defining "gambling devices" under the Johnson Act as not including class II technological aids used in Indian country. Suffice it to say, as explained by both the 9th and 10th Circuits, that the Senate Report and the explicit statutory provision in IGRA providing for the use of class II technological aids both provide powerful support for this approach. Indeed, the Department of Justice itself, when litigating this issue in the 9th Circuit, conceded the point, telling the court that it should "read the two acts harmoniously; if it's a bingo aid, it's not a Johnson Act gambling device." *United States v. 103 Electronic Gambling Devices*, 223 F.3d at 1102 n.13.

Petitioners' approach, by contrast, cannot be reconciled with either the text or the manifest intent of IGRA. Petitioners claim that class II gaming devices are subject to the proscriptions of the Johnson Act because IGRA states that a tribe may engage in class II gaming only if "such gaming is not otherwise *specifically* prohibited on Indian lands by Federal law." (Pet. at 10-11 (citing 25 U.S.C. § 2710(b)(1)(A)) (emphasis added).) According to the Petitioners, the Senate report reveals that the "specific prohibition" referred to in the savings clause is the Johnson Act. (Pet. 10-13.)

But the text and the legislative history actually provide scant support for this view. As a textual matter, IGRA's "savings clause" – the one strand of text on which Petitioners rely – references statutes that "specifically" prohibit gaming "on Indian land." Congress included these limiting principles deliberately. Earlier versions of the law that became IGRA had a much broader savings clause, permitting class II gaming only if "such gaming is not prohibited by federal law." S. Rep. No. 446, at 12 (1988), *reprinted* in 1988 U.S.C.C.A.N. 3071, 3082. By limiting IGRA's savings clause to statutes that specifically prohibit

gaming on Indian land, Congress excluded the Johnson Act, which is a statute of *general* application passed decades before the advent of modern Indian gaming (albeit on that applies in Indian country), while still reserving to Congress leeway to impose specific bans if necessary.

The Senate Report confirms the point. In explaining the meaning of the very phrase on which Petitioners rely, the Senate Report explicitly states that Congress did intend for class II technological AIDS to be relieved of potential Johnson Act liability. Hence, the Senate Report declares that, under IGRA, the Johnson Act does not apply to "devices used solely in aid of or in conjunction with bingo or lotto . . . ." Petitioners ask this Court either to ignore this declaration of congressional intent or limit it to "bingo blowers," even though, ironically, these devices (unlike Magical Irish) clearly do meet the definition of "gambling devices" under the Johnson Act.[6] Such a cramped approach to the use of class II technological aids, moreover, would conflict with Congress's manifest intent "that tribes be given the opportunity to take advantage of modern methods of conducting class II games[,] and the language regarding technology is *designed to provide maximum flexibility*." S. Rep. No. 100-446, at 9, 1988 U.S.C.C.A.N. at 3079.[7]

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[6] Bingo blowers, which randomly select the numbers to be called, would seem surely to qualify as Johnson Act gambling devices because they are designed primarily for use in gambling, involve the application of an element of chance, and render a person entitled to receive money or property.

[7] In their discussion of the legislative history, Petitioners focus on the sentence of the Senate Report which states that the language of the savings clause "not otherwise prohibited by federal law" refers to the Johnson Act. But, as noted above, Congress amended the savings clause to read "not otherwise specifically prohibited on Indian land by federal

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Rather than adhere to the flexible approach mandated by Congress, Petitioners also argue that IGRA's express exemption from the Johnson Act for gambling devices used in class III gaming indicates that Congress did not intend to exempt class II aids from the Johnson Act. (Pet. 13-14.) The principle of negative implication, however, is only an aid in discovering legislative intent when it is not otherwise manifest. *United States v. Barnes*, 222 U.S. 513, 519 (1912). Here, as discussed above, the Senate Report clearly indicates that Congress did not intend the Johnson Act to apply to class II aids. In addition, when there is no reason for the legislature to have included a provision in a statute, the omission of that provision means nothing at all. *United Dominion Ind., Inc. v. United States*, 532 U.S. 822, 836 (2001). The Senate Report indicates that Congress did not believe the Johnson Act applied to class II aids. S. Rep. No. 446, 100th Cong., 2d Sess. 12 (1988) ("[The Johnson Act] prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto.") Congress' failure to include an express exemption from the Johnson Act for class II gaming devices that Congress did not believe were covered by the Johnson Act in the first place simply has no significance.

B. The Purported Circuit Split over the Reconciliation of IGRA and the Johnson Act Does Not Implicate Any Significant State or Federal Interest

Petitioners insist that this Court should resolve the purported circuit split over whether class II technological

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law." Thus, the snippet of legislative history on which Petitioners stake their claim is directed at language that was meaningfully superceded.

aids may be subject to Johnson Act liability, but its reasons for seeking this resolution are insubstantial.

As a threshold matter, Petitioners will achieve nothing by having this Court resolve the alleged circuit split unless it also prevails on its view, rejected by the two courts to consider the issue, that pull-tab dispenser/displays are Johnson Act gambling devices. As discussed below, Petitioners' position is weak on both issues. Indeed, if there were any substantial merit to Petitioners' view, it would be expected that at least one court of appeal would take the Petitioners' side. Surely, in the absence of a single ruling for Petitioners, and in the face of the opposing view of the NIGC (the government agency charged with administering IGRA and a party to this case), as well as the Department of Justice's Office of Legal Counsel, there is no compelling reason for this Court to invest its scarce resources in such a one-sided dispute.

Even assuming, however, that Petitioners are right on every point, the issue is too insubstantial to warrant this Court's attention. According to Petitioners, the 10th Circuit's approach to the Johnson Act opens the door to class III casino style gaming in Indian country, which, in turn, undermines IGRA's regime for guarding against organized crime, and denigrates the role of states in regulating Indian gaming within their borders. (Pet. 15-21.)

These concerns are baseless. The 10th Circuit approach to the scope of the Johnson Act in no way opens the door for class III gaming in the absence of a compact precisely because, as the D.C., 8th, and 10th Circuit's have unanimously held (consistent with NIGC regulations), the devices at issue here are aids to class II gaming and *not* class III games. Absolutely nothing about the 10th Circuit opinion (or *Santee Sioux*, or *Diamond Game*, or *103 Gambling Devices*) changes the uncontested fact that class III gaming – including the slot machine devices at which

the Johnson Act takes aim – may be conducted only pursuant to a tribal-state compact. And because this limit on class III gaming remains wholly unaffected, IGRA's protections against organized crime[8] and its preservation of a regulatory role for the states remain vibrant.

Reading between the lines, Petitioners' real complaint seems to be that, in light of the proliferation of different types of class II gaming, courts are classifying too many devices as class II technological aids, thereby restricting state control over gaming. Whatever the merits of this view, Petitioners have not sought certiorari on the issue of whether Magical Irish is properly classified as a class II technological aid. If, as Petitioners seem to suggest, the category of class II aids has become too broad, the problem is certainly not raised by Magical Irish (which is a low-tech dispenser and visual aid that clearly received the proper classification). Moreover, this alleged problem, if it is really a problem at all, is one that Congress has the power to address at any time.

III. THE QUESTION OF WHETHER, INDEPENDENT OF IGRA, MAGICAL IRISH IS A GAMBLING DEVICE UNDER THE JOHNSON ACT IS NOT PRESENTED IN THIS CASE AND, IN ANY EVENT, DOES NOT MERIT THIS COURT'S REVIEW

The 10th Circuit never addressed the issue of whether, assuming the class II technological aids may be subject to Johnson Act liability, Magical Irish or other similar pull-tab dispensers in fact qualify as Johnson Act

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[8] It must also be observed that the record contains not a scintilla of evidence that the use of Magical Irish, Lucky Tab, or any other class II technological aid invites any law enforcement problems whatsoever.

"gambling devices." Accordingly, this issue is not properly presented in this case.

In any event, the particularities of how to define a Johnson Act gambling device is not an issue worthy of review. Whether a mechanism for playing a game of chance qualifies as a Johnson Act gambling device is an intrinsically factbound, case-by-case inquiry – in short, the kind of inquiry that this Court does not generally undertake, even if a lower court is in error. *See* S. Ct. Rule 10. The merits of the Petition, moreover, are not enhanced by its exaggerated claim of a circuit split between the 8th Circuit's decision in *Santee Sioux* and a 28-year old Ninth Circuit per curiam in *United States v. Wilson*, 475 F.2d 108 (9th Cir. 1973), involving a unrelated machine.

The "Bonanza" machine at issue in *Wilson* worked as follows: When an individual placed 25 cents into the machine, he would receive a coupon, the value of which was already visible in the viewing window of the machine. As a result of buying the first coupon, the player would also get a chance to see the next coupon in line, as it would replace the first coupon in the viewing window. The player could then decide whether or not to purchase the second coupon as well as a chance to view the third coupon in exchange for another 25 cents. *Wilson,* 475 F.2d at 108. The entire focus of both the majority opinion and the dissent in *Wilson* was "on whether playing a device that allowed the player to see what he was going to get before he deposited his money involved an 'element of chance.'" *Wilson,* 475 F.2d at 109. The majority concluded that it did, because in its view the user of the machine was really paying for the opportunity to view and purchase a subsequent, potentially more valuable, coupon.

The differences between the Bonanza machine and pull-tab dispensers like Magical Irish and Lucky Tab are legion. First, in contrast to pull-tab dispensers, the design

of the Bonanza device itself was an essential aspect of the game of chance being played. The lure of the game depended entirely on the viewing window – and the chance that a valuable coupon would pop into view after a relatively worthless coupon was purchased and gotten out of the way. Magical Irish and Lucky Tab, by contrast, simply dispense a ticket after money has been paid. The apparatus itself adds nothing substantive to the game. Second, while the underlying game of pull-tabs being played by Magical Irish and Lucky Tab is completely legal, the analysis in *Wilson*, sketchy as it is, proceeds from the assumption that the sale of chances to win a prize constituted *illegal* gambling. Thus, *Wilson* never addresses one key issue here, namely whether a device that dispenses the ticket of a lawful game can ever be deemed a Johnson Act device. Third, a person using the Bonanza machine plays against the machine itself, which contains all the winning and losing tabs. A person using Magical Irish or Lucky Tab, by contrast, is playing only a portion of a paper pull-tab deal and is, in fact, competing not against the machine but against other players of the same deal to find the winning paper tickets. In this regard, the play of the Bonanza machine much more closely resembles a slot machine (the target of the Johnson Act) than does Magical Irish or Lucky Tab.[9]

In any event, on the merits of whether Magical Irish and similar pull-tab dispenser/displays are Johnson Act gambling devices even without regard to IGRA, there can be little doubt that the 8th Circuit and the district court correctly concluded that they are not. The Johnson Act

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[9] In assessing the similarity between the Bonanza machine and a slot machine, moreover, the *Wilson* opinion is unclear on a key question for assessing Johnson Act status: whether the Bonanza machine itself randomly selects the next coupon or whether the coupons, as in Magical Irish and Lucky Tab, are pre-arranged.

definition of a gambling device is limited to machines or mechanical devices which involve "the *application* of an element of chance." 15 U.S.C. § 1171(a) (emphasis added). As both courts to have considered the matter agree, Magical Irish and similar pull-tab dispenser/readers do not *apply* any element of chance – they merely dispense pull-tabs from rolls in which the element of chance is pre-packaged – and, thus, they do not meet the Johnson Act definition of gambling devices. Indeed, another factor counseling against review in this Court is the detailed and substantial dispute between Petitioners and Respondents regarding the actual play of Magical Irish. To decide the Johnson Act issue posed by Petitioners, this Court would find it embroiled in a host of factual disputes about bar codes, software, and casino operations – disputes that, notably, the district court here resolved against Petitioners.

Petitioners deride the 8th Circuit's focus on the "application of an element of chance," as arbitrary, but it is both textually compelled and sound. "[T]he application of an element of chance" is an active construct. Something must apply the element of chance and, in the context of the Johnson Act, that "something" is most naturally read to be the machine or device that is to be proscribed. Petitioners construction has at least two glaring weaknesses. First, it would read the word "application" out of the statute (violating the canon of giving every word meaning). Second, it would lead to absurd results. If the device is not required to "apply" the element of chance, then every class II technological aid would be a prohibited Johnson Act device because they all are used in gaming that includes an "element of chance." Such a construction, of course, would render this aspect of IGRA a nullity.

Courts interpreting IGRA have neatly avoided this error by using the criteria of whether a device actually applies the element of chance as a basis for distinguishing between class II technological aids, which do not generate

the element of chance, and class III electronic facsimiles, which do. On this basis, for example, the 9th Circuit ruled that computerized pull-tab dispensers *which also contain a random number generator to create the pull-tab deal*, are, in contrast to Magical Irish, class III facsimiles that could only be played pursuant to a tribal-state compact. *See Sycuan Band of Mission Indians v. Raoche*, 54 F.3d 535 (9th Cir. 1995).

By recognizing that Johnson Act gambling devices must apply an element of chance to the game being played, the 8th Circuit (like the district court here) effectively harmonized the Johnson Act with IGRA's allowance of class II technological aids. Under this approach, a device that applies an element of chance cannot qualify as an class II technological aid, but may constitute a Johnson Act gambling device assuming that it meets the statute's other definitional elements. In the last analysis, the 8th Circuit has simply taken a different route for reaching the same result as the 10th Circuit here, namely to give both IGRA and the Johnson Act their greatest possible effect by ruling that the Johnson Act does not reach class II technological aids.

Finally, Petitioners claim that the question of whether the Lucky Tab II dispenser is a "gambling device" under the Johnson Act may have important "ramifications outside as well as inside Indian Country." (Pet. at 18.) But Petitioners' boilerplate arguments about the potential effects of the 8th Circuit decision are purely speculative. Petitioners have presented no evidence that anyone has attempted to introduce pull-tab dispensers or similar machines in another federal territory or that interstate shipment of such machines is a matter of serious national concern. As the Petitioners recognize, states can impose their own restrictions on the use of pull-tab dispensers within their own borders. At the end of the day, the 8th and 10th Circuit decisions below, and the D.C. Circuit's

decision in *Diamond Game Enterprises*, simply let tribes that can already sell pull-tabs legally use electronic dispensers as a method of sale, much like selling aspirin in a vending machine instead of over-the-counter. Refereeing the dynamics of a vending machine is hardly an enterprise worthy of this Court's time.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 03-740

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

SENECA-CAYUGA TRIBE OF OKLAHOMA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents do not, and cannot, dispute that a square conflict exists between the Tenth Circuit in this case and the Eighth Circuit in *United States* v. *Santee Sioux Tribe*, 324 F.3d 607 (2003), petition for cert. pending, No. 03-762, on the principal question presented in the petition: whether the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, provides an implied exemption from the Johnson Act, 15 U.S.C. 1171 *et seq.*, for certain gambling devices used at tribal casinos in the absence of a tribal-state compact. Although respondents claim that the case has been mooted by their own voluntary conduct, the court of appeals correctly rejected that claim. Indeed, in view of respondents' admission that they have continued to manufacture and use substantially similar machines, there can be no question that a live controversy exists over whether they are subject to prosecution under the Johnson Act for the transportation, sale, or possession of such machines in Indian country.

Although respondents also claim that the Tenth Circuit was correct in holding that the Johnson Act has no application to gambling devices used by Tribes as supposed "electronic, computer, or other technologic aids" to Class II

games under IGRA, that would be no reason, even if true, to withhold review. In any event, respondents' defense of the Tenth Circuit's holding is unavailing, as is their attempt to diminish the significance of this case for the regulation of gaming in Indian country. As confirmed by the nine amici States that have urged the Court to grant the government's certiorari petition, this case "dramatically and erroneously undermines the important balance between Tribal and State interests in the compromise legislation that is IGRA." Br. of Amici Br. of States of California, et al. (States Br.), at 6.

A. THERE IS NO MERIT TO RESPONDENTS' SUGGESTION THAT THIS CASE HAS BEEN MOOTED BY THEIR OWN VOLUNTARY CONDUCT

Respondents contend that this case has become moot solely because respondent Diamond Game Enterprises has voluntarily ceased to manufacture Magical Irish and the other respondents have voluntarily ceased to use Magical Irish at their casinos. Br. in Opp. 15-18. The court of appeals correctly rejected that contention. Pet. App. 14a-17a. This case continues to present a live controversy about whether the Johnson Act prohibits the use of Magical Irish and similar devices at tribal casinos in the absence of a tribal-state gaming compact. The fact that respondents have shifted from one materially indistinguishable device to another does not render the case moot.

This Court has articulated the analysis to be applied in determining whether or not "a request for declaratory relief is moot": "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.*" *Preiser* v. *Newkirk*, 422 U.S. 395, 402 (1975) (quoting *Maryland Cas. Co.* v. *Pacific Co.*, 412 U.S. 270, 273 (1941)). The inquiry is thus comparable to that for assessing whether a justiciable controversy exists in cases seeking

other sorts of relief. As the Court has noted, "[i]t is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case." *Maryland Cas.*, 312 U.S. at 273. The mere fact that respondents are declaratory judgment plaintiffs does not, therefore, suggest that any special weight should be accorded their assertions that they do not intend to resume manufacturing or using Magical Irish. There are, in fact, several independent reasons why the issues presented in the petition retain "sufficient immediacy and reality" to warrant resolution.

First, respondents have continued, in practical effect, to manufacture and use Magical Irish, albeit under a different name and a slightly different design. As respondents acknowledged below, respondent Diamond Game Enterprises still manufactures Lucky Tab II, and the respondent Tribes use Lucky Tab II at their casinos. See Pet. App. 13a. Lucky Tab II, the device in *Santee Sioux*, is indistinguishable from Magical Irish for purposes of the legal issues in this case.

Respondents have not disputed the substantial similarity of Magical Irish and Lucky Tab II for such purposes. Indeed, respondents brought this case in response to an advisory ruling of the National Indian Gaming Commission (NIGC), which relied on a (since vacated) district court opinion classifying Lucky Tab II as a Class III device under IGRA and which expressly recognized that "Lucky Tab II closely parallels Magical Irish." Letter of Kevin K. Washburn, General Counsel, NIGC, to Stephan A. Lemske 3 (Feb. 29, 2000); see *id.* at 6 ("[T]he system features [of Magical Irish] are almost entirely those of Lucky Tab II."); Pet. App. 9a-10a; compare Pet. App. 8a-9a (describing Magical Irish), with *Santee Sioux*, 324 F.3d at 610 (describing Lucky Tab

II), and *Diamond Game Enters.* v. *Reno*, 230 F.3d 365, 367-368 (D.C. Cir. 2000) (same).[1]

Second, respondents profess to have brought this action because they feared prosecution under, *inter alia*, the Johnson Act for the sale, use, or possession of Magical Irish. See Br. in Opp. 17-18. The possibility of such prosecution continues to exist. As the court of appeals recognized, because respondents did not cease their Magical Irish activities until November 2000 (and, in some cases, December 2001), the statute of limitations for a Johnson Act prosecution would not run until at least November 2005. Pet. App. 15a.

Third, respondents' choice to cease manufacturing and using Magical Irish was purely voluntary. They retain the discretion to resume those activities at any time. As this Court has explained, "[v]oluntary cessation of challenged conduct moots a case * * * only if it is *absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216, 222 (2000) (per curiam) (internal quotation marks omitted). It is not at all clear that the behavior on which respondents sought a declaratory ruling will not recur—even aside from the fact that essentially the same behavior has continued with respect to Lucky Tab II.

B. RESPONDENTS' ANALYSIS OF THE RELATIONSHIP BETWEEN THE JOHNSON ACT AND IGRA IS CONTRARY TO IGRA'S TEXT AND HISTORY

Contrary to respondents' assertions, neither the text nor the legislative history of IGRA suggests that Congress, by authorizing Tribes to use "technologic aids" to conduct bingo and (arguably) other Class II games, intended to allow

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[1] Although respondents identify two design differences between Lucky Tab II and Magical Irish (see Br. in Opp. 9 n.2), neither is material to the questions here. If anything, the distinctive features of Lucky Tab II, such as the combination of component parts into a single unit, enhance the resemblance to a slot machine or other gambling device.

Tribes to use Johnson Act gambling devices. See Br. in Opp. 19-23. As previously explained (Pet. 10-17), the text of IGRA makes clear that the Johnson Act remains fully applicable to all gambling devices on Indian lands with one exception (*i.e.*, when a Tribe has entered into a Class III gaming compact with a State, see 25 U.S.C. 2710(d)(6)). That reading is confirmed by the Senate Report and other legislative history.

IGRA states that a Tribe may engage in Class II gaming only if "such gaming is not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. 2710(b)(1)(A). Respondents are incorrect that the Johnson Act is too "general" to be such a law. Br. in Opp. 22. The Johnson Act explicitly makes it unlawful to "possess[] or use any gambling device * * * within Indian country." 15 U.S.C. 1175(a). More specifically prohibitory language would be difficult to imagine, and respondents do not identify any supposedly more "specific" statute to which Section 2710(b)(1)(A) might have been intended to refer. Indeed, the Senate Report makes clear that the Johnson Act is precisely the "Federal law" referred to in Section 2710(b)(1)(A). S. Rep. No. 446, 100th Cong., 2d Sess. 12 (1988) ("The phrase 'not otherwise prohibited by Federal Law' refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175.").

Respondents, like the court of appeals, misread the Senate Report—which could not, in any event, contradict the unambiguous statutory text. The Report, as noted, explicitly states that Section 2710(b)(1)(A), in preserving other federal laws that prohibit gaming in Indian country, refers to the Johnson Act. Moreover, the sentence in the Report on which respondents rely (Br. in Opp. 5) expresses an intent to permit Tribes to use *only* "otherwise legal devices" in Class II gaming (S. Rep. No. 446, *supra*, at 12)—a phrase that excludes "gambling devices" that are illegal under the Johnson

Act, which the text of Section 2710(b)(1)(A), confirmed by the Report, continues to make applicable to Indian country.

Although respondents seize on the Report's statement that the Johnson Act "prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto," *ibid.*, that statement is of no help to respondents. It does not evince any congressional intent to permit Tribes to use, as "aids" to Class II gaming, gambling devices, such as Magical Irish, that are prohibited by the Johnson Act. At most, the statement expresses the view of a later Congress on whether certain unidentified devices used in connection with bingo or lotto are prohibited by the Johnson Act as enacted years earlier. Whatever the soundness of the Report's view that the Johnson Act does not apply to those devices (see Pet. 12 n.2 (discussing IGRA's narrow authorization for bingo numbers to be either "drawn" or "electronically determined," 25 U.S.C. 2703(7)(A)(II))), the Report does not make any reference to "pull tabs" or suggest the sort of wholesale *exemption* from the Johnson Act that respondents urge for any device that could be characterized as an "aid" to playing a Class II game like *paper* pull tabs. If there could be any lingering doubt, however, it is dispelled by the statement of Senator Inouye, IGRA's sponsor, immediately before its Senate passage. He stated that IGRA "would not alter the effect of the Johnson Act except to provide for a waiver of its application in the case of gambling devices operated pursuant to a compact with the State." 134 Cong. Rec. 24,024 (1988).

Respondents' reliance on the Report's references to affording Tribes "maximum flexibility" to use "modern methods of conducting class II games" is also misplaced. Br. in Opp. 22. As the rest of the paragraph that respondents quote makes clear, that statement refers to the use of "telephone, cable, television or satellite" equipment to enable Tribes "to coordinate their class II operations" by, "[f]or

example, linking participant players at various reservations." S. Rep. No. 446, *supra*, at 9. Such equipment, which does not come within the Johnson Act's "gambling device" definition (*e.g.*, because it is not "designed and manufactured primarily for use in connection with gambling," 15 U.S.C. 1171(a)(2)), is entirely unlike Magical Irish and similar devices, which are designed to resemble slot machines.

Because IGRA's text makes clear that Johnson Act gambling devices *cannot* be used in Class II gaming, there is no warrant to resort to the canons of construction urged by respondents. Nor would the application of those canons assist respondents. For example, respondents' countertextual construction of Section 2710(b)(1)(A) is not necessary, as they assert, "to give effect" to IGRA, and specifically to its allowance of "aids" to Class II games. Br. in Opp. 19-20. As noted above, Section 2710(b)(1)(A) leaves a wide array of "aids" available to Tribes, including the "telephone, cable, television or satellite" equipment specifically referred to in the Report. Nor are respondents assisted by the canon that a "specific statute governs over a more general one," *id.* at 20, because the Johnson Act is no less specific than IGRA and, in any event, IGRA *itself* addresses the continued applicability of the Johnson Act to gaming in Indian country. See 25 U.S.C. 2710(b)(1)(A) and (d)(6).

C. RESPONDENTS ERR IN ASSERTING THAT THE QUESTION WHETHER THE JOHNSON ACT APPLIES TO GAMBLING DEVICES USED IN CLASS II GAMING DOES NOT WARRANT REVIEW

As explained in the petition (at 18-20), the Tenth Circuit's decision in this case conflicts with the Eighth Circuit's decision in *Santee Sioux* and undermines the regulatory scheme that Congress created in IGRA. Each reason is sufficient in itself to warrant the Court's review.

Contrary to respondents' suggestion, the disagreement between the Eighth and the Tenth Circuits cannot be dis-

missed as "academic" merely because the Eighth Circuit ultimately ruled against the government on other grounds. Br. in Opp. 18. The Eighth Circuit squarely held that a machine cannot be used in tribal gaming absent a tribal-state compact unless the machine *both* is not a "gambling device" as defined in the Johnson Act *and* is a "technologic aid" to Class II gaming as defined in IGRA. See 324 F.3d at 611-612. Although the Eighth Circuit held that the Lucky Tab II machine satisfied both requirements, the court understood that *other* machines, even if they are "technologic aids" under IGRA, still would be prohibited as "gambling devices" under the Johnson Act. In the Tenth Circuit (as well as the Ninth Circuit), in contrast, the sole inquiry is whether the machine is a "technologic aid" under IGRA.

IGRA contemplates an important role for the States in the regulation of casino-style tribal gaming—in particular, gaming that involves the use of slot machines and other Johnson Act devices. See Pet. 15-17. Congress understood that only the States had significant experience in regulating such gaming, which posed a particular threat of exploitation by organized crime and other criminal elements. Congress accordingly provided that Johnson Act gambling devices could be used in tribal gaming if, but only if, a Tribe had entered into a compact with "a State in which gambling devices are legal." 25 U.S.C. 2710(d)(6)(A). It was thus the Johnson Act itself that was to demarcate, to a significant extent, the relative spheres of regulatory authority of States (for Class III gaming) and the NIGC (for Class II gaming). Congress did not intend that the general and potentially expansive term "electronic, computer, or other technologic aid" elsewhere in IGRA would determine which tribal gambling was subject to state regulation and which was subject to NIGC regulation. Yet, that is the consequence of the court of appeals' decision. Respondents are thus incorrect that the Tenth Circuit's decision "in no way opens the door for class III gaming in the

absence of a compact." Br. in Opp. 24. The decision precludes state regulation, through the compacting process, of gaming that Congress placed in Class III.[2]

The importance of the Tenth Circuit's decision to tribal gambling regulation is confirmed by the nine States with Class II tribal gaming that have filed a brief as amici urging the Court's review in this case. As those States explain, the Tenth Circuit's decision and similar decisions have the potential to prevent States from exercising regulatory oversight of Johnson Act gambling devices "to ensure against fraud, corruption, and infilration by Organized Crime," as well as from securing compensation for the social, environmental, and public safety costs that States incur as a result of such gaming. States Br. 1-2, 3-5. Those States also explain that resolution of the conflict between the Eighth and Tenth Circuits on the question presented here is

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[2] Respondents' assertion of "opposing view[s]" within the United States government on the questions presented by this case is potentially misleading. Br. in Opp. 24. The positions expressed in the certiorari petition are, of course, the positions of the United States. As stated in the petition, although a divided NIGC recently took the view that the Johnson Act does not apply to Class II aids, that view "is contrary to the text and history of IGRA and does not represent the position of the United States." Pet. 22 n.7. Respondents also rely on a 1996 memorandum of the Department of Justice's Office of Legal Counsel, which stated that "Congress did not intend for section 1175 [the Johnson Act] to bar the use of [certain] technologic aids on Indian lands when operated in compliance with the class II provisions of IGRA," even when such aids are "gambling devices" under the Johnson Act. Memorandum to Seth P. Waxman, Associate Deputy Attorney General, from Richard Shiffrin, Deputy Assistant Attorney General (June 13, 1996). As the government explained below, that memorandum has been repudiated and does not represent the United States' interpretation of the Johnson Act or IGRA. Gov't C.A. Br. 25-26 n.2. To the extent that respondents might be understood to imply that the NIGC or the Office of Legal Counsel has taken the position that Magical Irish and Lucky Tab II do not satisfy the Johnson Act's "gambling device" definition, any such understanding would be incorrect. And, in any event, the Department of Justice, not the NIGC, has the authority to interpret and enforce the Johnson Act.

important to prevent "confusion and discord between Tribes and States." *Id.* at 11.

D. THE QUESTION WHETHER MACHINES SUCH AS MAGICAL IRISH AND LUCKY TAB II SATISFY THE JOHNSON ACT'S "GAMBLING DEVICE" DEFINITION ALSO WARRANTS THE COURT'S REVIEW

For reasons more fully explained in the government's certiorari petition and reply brief in *Santee Sioux*, this Court's review is also warranted on the question whether the Johnson Act's "gambling device" definition, 15 U.S.C. 1171(a)(2), applies to machines such as Magical Irish and Lucky Tab II. While the Tenth Circuit did not reach that question, this Court would have the authority to do so. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984) ("Although we do not ordinarily consider questions not specifically passed upon by the lower court, this rule is not inflexible, particularly in cases coming, as this one does, from the federal courts.") (internal citation omitted). Here, the parties addressed whether Magical Irish is a "gambling device" under Section 1171(a)(2) at all stages of the proceedings, and the district court decided that question. See Pet. App. 46a. And, if the certiorari petition is granted in *Santee Sioux*, essentially the same question will already be before the Court.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted and the case should be consolidated for argument with *United States* v. *Santee Sioux Tribe*, No. 03-762.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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In The
Supreme Court of the United States

JOHN D. ASHCROFT,
ATTORNEY GENERAL, et al.,

Petitioners,

v.

SENECA-CAYUGA TRIBE OF OKLAHOMA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, CONNECTICUT, MASSACHUSETTS, MINNESOTA, NEBRASKA, NEVADA, SOUTH DAKOTA AND TEXAS IN SUPPORT OF THE UNITED STATES

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BRIEF OF AMICI CURIAE

The states of California, Alabama, Connecticut, Massachusetts, Minnesota, Nebraska, Nevada, South Dakota and Texas respectfully submit this brief as amici curiae pursuant to Supreme Court Rule 37.4, in support of the petition of the United States. The brief addresses only the first question presented in that petition:

> Whether a machine may be classified properly as a mere technologic aid to a class II game if it is in fact a "slot machine of any kind" within the meaning of IGRA or a prohibited "gambling device" within the meaning of the Johnson Act.

INTEREST OF AMICI CURIAE

Amici curiae are States that have within their borders Indian Tribes that currently conduct class II gaming, as defined by the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2703(7)(A), or may seek to do so in the future. Until relatively recent times, class II gaming has generally consisted of traditionally low-stakes games such as bingo or pull-tabs. With the advent of improved technology, however, this is no longer so. The decision of the Tenth Circuit below would authorize Tribes to offer otherwise prohibited slot-machine gaming in the guise of "technologic aids" to the play of class II games of chance. In so doing, the court of appeals' decision threatens substantially to undermine the only means available for States to ensure adequate regulation of slot-machine gambling conducted on Indian lands, *viz.*, the negotiated Tribal-State compact.

Tribal casinos and the attendant casino-style gambling can place significant financial, environmental,

regulatory, and social burdens upon States. Accordingly, when Tribes seek to offer casino-style gambling, States understandably desire to address not only regulatory oversight of the games and devices themselves, to ensure against fraud, corruption, and infiltration by Organized Crime, but also to negotiate about the acceptable size of the casino operation itself – including, for example, the acceptable number of slot machines that may occupy a casino site. Indeed, California, has negotiated 63 compacts containing provisions that, among other things, limit the number of slot machines permissible on Indian lands and set fees per slot machine designed to provide income to Tribes that are unable or unwilling to operate large class III gaming facilities. Cal. Gov't. Code § 12012.75. These compacts also contain provisions that: (a) make funds available to the State and to local governments to address gambling addiction; (b) provide money to alleviate environmental and other impacts stemming from the construction of tribal gaming facilities; (c) compensate the State for its regulatory costs incurred as a result of the compacts; and (d) provide disbursements for the purpose of implementing the terms of tribal labor relations ordinances included in compacts. Cal. Gov't. Code § 12012.85; see, *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003), *petition for cert. filed, sub nom., Coyote Valley Band of Pomo Indians v. State of California*, No. 03-804. Congress has ensured that States may negotiate with Tribes to address the potential burdens of casino gambling by classifying all such gambling as "class III gaming" in IGRA and by requiring Tribes to negotiate with States about the regulation and alleviation of those potential impacts.

Prior to issuance of the decision below, States could be assured that slot machines within the meaning of the

Johnson Act, 15 U.S.C. § 1171(a)(1), would be the subject of a negotiated compact if a Tribe desired to offer slot-machine gambling as a source of revenue. Up until now, there was little doubt that Tribes offering gaming by means of slot machines and other devices encompassed by the Johnson Act were engaging in class III gaming within the meaning of IGRA. 25 U.S.C. § 2703(8) (class III gaming is gaming that is neither class I nor class II gaming) § 2703(7)(B)(ii) (class II gaming excludes "slot machines of any kind"); and that they are unquestionably obligated to negotiate with the State about those machines. But the Tenth Circuit has now adopted an analysis that looks first to IGRA for a determination of whether the device can be classified as a "technologic aid" to the play of a class II game of chance. According to the court, if the answer to that question is affirmative, there is no further need to inquire whether the device would also constitute a slot machine or gambling device within the meaning of the Johnson Act.

The result of the lower court's analysis is that machines that are *in fact* slot machines within the meaning of the Johnson Act may nevertheless be offered in tribal casinos as *class II* gaming and may, therefore, be offered without negotiation with the State. Numerous writers confirm that this is no idle threat. For example, the Chairman of the National Indian Gaming Commission has acknowledged that California Indian casinos can be expected to offer a significant number of so-called class II devices because they offer an attractive way to meet the demand for class III devices and, at the same time, avoid the limit on the number of permissible class III devices in the State. (Steve Wiegand, *Casinos Could Hold Cards In Talks,* Sacramento Bee, Nov. 17, 2003, *available at* http://www.gamblingmagazine.com/ManageArticle.asp?C=280&A=

8779; Marian Green, *Class II Games Come of Age,* Slot Manager, Sept. 2003, *available at* http://www.igwb.com/Publications/currentpubs/slotmanagercover.htm. Similarly, a manufacturer of these devices has stated that because "many recognized tribes in California lack compacts with the state [they] are prime candidates for our new generation Class II games." Tom Wanamaker, *Guidelines Make Class II Gaming More Attractive,* Indian Country, Dec. 2003, *available at* http://www.indiancountry.com/?1070389032. By virtue of the Tenth Circuit's decision, the Tribes' ability entirely to circumvent IGRA's negotiation obligations with respect to slot machines is merely a function of human creative ability to design slot machines that – in the case of pull-tab devices, for example – permit push-button "play" of a coded strip-roll of paper "pull-tabs," providing a visual and auditory display of the outcome represented by bells and the aligning of the reels of a virtual "one-armed bandit." From the player's point of view – and, therefore, from the perspective of a need for negotiated compact treatment – these so-called "technologic aids" are indistinguishable in any meaningful sense from any other slot machine along the casino wall. See, e.g., *Diamond Game Enterprises, Inc. v. Reno*, 9 F.Supp.2d 13, 20-21 (D.D.C. 1998), *rev'd*, 230 F.3d 365 (D.C. Cir. 2000). As a gaming industry commentator notes, "a new casino competitor is coming to America: the bingosino." I. Nelson Rose, *Is It Bingo, or a Slot Machine?,* I. Nelson Rose Gaming Gurus, Oct. 14, 2003, *available at* http://rose.casinocitytimes.com/articles/7264.html. The "bingosino" will feature video bingo devices that are "virtually indistinguishable from video slots" and will be joined by "other machines and fast-action table games, giving bingo halls, especially those on Indian land, the look and feel of casinos." *Id.*

Indeed, the Tenth Circuit decision frankly invites creative minds to develop even more highly sophisticated "technologic aids" in order to render the Johnson Act utterly meaningless as a limitation on the kinds of machine-facilitated gambling that can be conducted on Indian lands without a negotiated Tribal-State compact. As the United States correctly observes in its petition for certiorari, if the lower court's decision is upheld, Tribes without compacts could open casinos offering games similar to the one at issue in this case and completely avoid the compact process. Pet. at 20-21. Similarly, those Tribes that do have compacts, could avoid restrictions placed on the number of permissible class III devices by installing slot-machine "technologic aids." *Id.* at 20. They could also avoid revenue sharing obligations by replacing some or all of their class III devices with comparable machines of the sort at issue here. *Id.* at 20-21.

Amici States urge the Court to grant the petition of the United States in order to restore Congress's intended balance between Tribal interests in the conduct of low-stakes class II gaming and State interests in the conduct of high-stakes class III gaming.

SUMMARY OF ARGUMENT

The slot machine is the icon of casino gambling. This case arises precisely because slot machine gambling is highly lucrative – both for Tribes and for the device manufacturers – and Tribes have long sought ways to conduct slot-machine gambling operations free from the restrictions of a Tribal-State Compact. See, e.g., *Diamond Game Enterprises, Inc. v. Reno*, 9 F.Supp.2d 13; *Cabazon Band of*

Mission Indians v. National Indian Gaming Com'n, 827 F.Supp. 26 (D.D.C. 1993) (re video pull-tab machine); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994) (re "Auto-Tab 101").

The determination of whether machine-facilitated gambling constitutes class II gaming within the meaning of IGRA and is, therefore, immune from the compact-negotiation process, cannot reasonably be isolated from a determination of whether the machine constitutes a slot machine or gambling device within the meaning of the Johnson Act, 15 U.S.C. § 1171(a)(1). In IGRA Congress relaxed the Johnson Act's otherwise absolute prohibition against slot machines in Indian country in only one circumstance, *viz.*, the operation of such machines pursuant to a Tribal-State Compact. 25 U.S.C. § 2710(d)(6).

To the extent that the Tenth Circuit analyzes the issue solely by reference to the question of whether a machine can be said to be a "technologic aid" to the play of a class II game, see, 25 U.S.C. § 2703(7)(A)(i) (defining "bingo" to include the game when played with the aid of a "technologic device"), without reference whatsoever to the Johnson Act, the court dramatically and erroneously undermines the important balance between Tribal and State interests in the compromise legislation that is IGRA. Furthermore, the analysis of the Tenth Circuit directly conflicts with that of the Eighth Circuit in *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607, 611 (2003), *petition pend.*, No. 03-762, in which that court held that the Johnson Act is an express limitation on the conduct of any class II gaming under IGRA.

Amici urge that the Court grant the petition of the United States in order to clarify the proper relationship

between IGRA and the Johnson Act for purposes of classifying gambling machines as class II gaming and in order to resolve the split of authority between the Tenth and the Eighth Circuits on this point.

ARGUMENT

I.

BY AUTHORIZING TRIBES TO OFFER SLOT MACHINES AS CLASS II GAMING ACTIVITIES, THE TENTH CIRCUIT UNDERMINES CONGRESS'S ASSURANCE TO STATES THAT SLOT MACHINES MAY BE OFFERED ON INDIAN LANDS ONLY IN ACCORDANCE WITH A NEGOTIATED TRIBAL-STATE COMPACT.

The critical balance of Tribal and State interests that was ultimately effected by Congress in IGRA is that class I and class II gaming activities may be conducted by Tribes on their lands without state regulatory involvement, and that class III gaming activities may only be conducted on such lands by Tribes in accordance with a negotiated and approved compact. 25 U.S.C. § 2710(d)((1)(C); see, 134 Cong. Rec. 25,376 (1988) (statement of Rep. Udall) (the "core of the compromise" was the requirement that "class III gaming activities, generally defined to be casino gaming and parimutuel betting, will hereafter be legal on

Indian reservations only if conducted under a compact between the tribe and the State").[1]

Relevant to the instant matter, IGRA provides that "class II gaming," *i.e.*, non-compacted gaming, encompasses bingo played with "technologic aids."[2] But IGRA makes equally clear that class II gaming excludes "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B)(ii). Gaming by use of such devices, therefore, constitutes class III gaming, and is subject to regulation pursuant to a Tribal-State compact. 25 U.S.C. § 2710(d)(1)(C).

The balance struck by Congress is substantially altered by the Tenth Circuit's ruling that the determination of whether a machine amounts to class II or class III gaming can be made solely on the basis of whether the machine may be characterized as a "technologic aid" to the play of a game of chance, in this case "pull-tabs." Under the Tenth Circuit's reasoning, the inquiry stops – without regard to the question whether the machine might also come within the coverage of the Johnson Act as a gambling device. Pet. at 38a. The court's methodology thus wholly ignores Congress's express exclusion of "slot machines of

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[1] Representative Udall was the House floor manager of the bill that became IGRA.

[2] Some lower courts have construed IGRA to include as class II gaming the conduct of bingo as well as pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo with the assistance of a "technologic aid." See, e.g., *Diamond Game Ent., Inc. v. Reno*, 230 F.3d 365, 367 (D.C. Cir. 2000), but the construction is not universally accepted. Cf., *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d at 613.

any kind" from the category of class II gaming. 25 U.S.C. § 2703(7)(B)(ii).

Amici States submit that any determination of whether machine-facilitated gambling constitutes class II gaming for purposes of IGRA must include a determination of whether the machine is a gambling device within the meaning of the Johnson Act.[3] That Act prohibits the possession of "any gambling device" within "Indian country." 15 U.S.C. § 1175(a). The Act also prohibits the transportation of such devices to any State where their operation is made unlawful by State law. 15 U.S.C. § 1172(a). The Tenth Circuit's reasoning would permit the operation of slot machines that come within the meaning of the Johnson Act to be operated on Indian lands, without regulation under an approved Tribal-State compact, under the guise of "technologic aids." Nevertheless, the appellate court implicitly concedes that the Government might prosecute operation of identical devices in the same State off-reservation. Such a dual standard for enforcement of the Johnson Act – with respect to the same device, and within the same State – is inconsistent with Congress's insistence that, without agreement by the State, class III gaming activities are permissible on Indian lands only to

[3] Indeed, even if "the Machine," the device at issue in this matter, could be said to constitute class II gaming played by use of a "technologic aid," the court's reasoning ignores Congress's express restriction that class II gaming may be conducted on Indian lands only if "such gaming is not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. § 2710(b)(1)(A). In analyzing IGRA, the Report of the Senate Select Committee on Indian Affairs notes that "the phrase 'not otherwise prohibited by Federal Law' refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. § 1175 [the Johnson Act]." S. Rep. No. 446, 100th Cong., 2d Sess. 12 (1988).

the extent that they are also permitted elsewhere within the State. 25 U.S.C. § 2710(d)(1)(B); see, also, *Rumsey Indian Rancheria of Wintun Indians v. Wilson,* 64 F.3d 1250 (9th Cir. 1994), *opinion amended on denial of rehearing*, 99 F.3d 321, *cert. denied*, 521 U.S. 1118].

Congress expressly acknowledged the relationship between class III gaming and the Johnson Act, relaxing the Johnson Act's Indian-country prohibitions in only one circumstance: "gaming conducted under a Tribal-State compact." 25 U.S.C. § 2710(d)(6). The petition of the Attorney General should be granted to settle that no gambling device within the meaning of the Johnson Act – whether or not characterized as a "technologic aid" to the play of pull-tabs – may be offered by Tribes in their casinos except in accordance with a Tribal-State compact.

II.

THE PETITION SHOULD BE GRANTED TO RESOLVE A CIRCUIT CONFLICT CONCERNING THE RELEVANCE OF THE JOHNSON ACT TO A DETERMINATION OF WHETHER A MACHINE MAY BE CLASSIFIED AS CLASS II GAMING FOR PURPOSES OF IGRA.

Whereas the Tenth Circuit has concluded that coverage of the device under the Johnson Act is irrelevant to classification of a "technologic aid" to the play of pull-tabs as class II gaming, the Eighth Circuit has recently come to the contrary conclusion in *United States v. Santee Sioux Tribe of Nebraska,* 324 F.3d at 611.

In *Santee Sioux Tribe*, the Eighth Circuit concluded that the Johnson Act is the federal law referred to in 25

U.S.C. § 2710(b)(1)(A) as a limitation on IGRA class II gaming and that class II gaming is only lawful in Indian country if it is conducted in conformity with the Johnson Act. *Santee Sioux Tribe* at 611. The court noted that Congress had not expressly repealed the Johnson Act's prohibitions against slot machines in Indian country, except for effecting a *pro tanto* repeal under 25 U.S.C. § 2710(d)(6) in the exclusive context of gaming conducted pursuant to a Tribal-State compact. Moreover, relying on this Court's decision in *Morton v. Mancari*, 417 U.S. 535, 550 (1974), the court rejected the contention that IGRA impliedly repealed the Johnson Act with respect to class II devices. *Santee Sioux Tribe* at 611.

The petition of the United States should be granted to resolve this conflict in the interests of both States and Tribes. The nearly simultaneous issuance of these two conflicting circuit court analyses can only foster confusion and discord between Tribes and States over compacting obligations under IGRA. See, *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1097 (9th Cir. 2003) (as sources of substantial revenue class III gaming activities are recognized as "'the most controversial part of . . . IGRA and the subject of considerable litigation between various Indian tribes and the states.'" (Citations omitted.).)

CONCLUSION

For the reasons stated, Amici States urge the Court to grant the petition of the United States.

Respectfully submitted,

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